

MOA

(Memorandum of Agreement)

Guidelines

for the

Public Law 86-121
Sanitation Facilities Construction Program

Prepared by
Division of Sanitation Facilities Construction
Office of Environmental Health and Engineering

Working DRAFT

June 2003



Department of Health and Human Services
Public Health Service
Indian Health Service





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TO: Associate Directors, Office of Environmental Health and Engineering
Directors, Division of Sanitation Facilities Construction
All Areas

FROM: Acting Director
Office of Environmental Health and Engineering
Headquarters

SUBJECT: Memorandum of Agreement Guidelines–Revised Working Draft

Since the last update of this document in 1993, many changes occurred that affect the Indian Health Service (IHS) Sanitation Facilities Construction (SFC) Program. Most notable are the amendments to Public Law 93-638, the Indian Self-Determination and Education Assistance Act, which facilitated opportunities for tribes to administer their own primary health care and public health programs. Since 1993, the SFC Program developed many policy guidance documents interpreting the Memorandum of Agreement (MOA) content and implementation and clarifying how the SFC Program accomplishes projects under self-governance and self-determination. While the overall function of the MOA is unchanged, quality management initiatives necessitate additional procedural controls over the content and use of the instrument.

These Guidelines are intended for use by SFC Program staff, tribal leaders, and other MOA parties to insure that the MOA is implemented consistently in all IHS Areas. This update by the IHS Division of Sanitation Facilities Construction took more than two years to complete and incorporates previously approved guidance documents. Much effort was put into refining IHS policy on the appropriate use of the MOA.


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PREFACE

*"--IHS' use of the memorandum of agreement as an obligating document is legal."
[Government Accounting Office. HRD-80-124. September 30,1980.]*

This document is the guideline for using the Memorandum of Agreement under Public Law 86-121 (42 U.S.C. 2004a), which is a unique authority provided to the Indian Health Service (IHS), Sanitation Facilities Construction (SFC) Program. These guidelines are the SFC Program's response to the IHS Quality Management Initiative and are a Working Draft. These guidelines were issued initially in May 1990. This revision includes changes in the SFC Program implementation that resulted from the Indian Self-Determination and Education Assistance Act, Public Law 93-638, as amended. All IHS Areas apply these policies and procedures uniformly to insure that the SFC Program is executed consistently throughout the nation.

Please direct all questions and comments about this document to the IHS Headquarters SFC Program through the respective IHS Area Office SFC Program Director. Mention of trade names or commercial products does not constitute endorsement or recommendation for use.

Note: The inclusion of laws, regulations, OMB Circulars, and other documents are for reference purposes only. They are included in this version of the MOA Guidelines because many IHS staff in remote locations do not have those documents readily available.

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ABBREVIATIONS

108 contract	Title I services contract under the authority of Section 108, P.L. 93-638
A-87	see OMB A-87
A/E	Architect/Engineer
ACHP	Advisory Council on Historic Preservation
AFA	Annual Funding Agreement, P.L. 93-638, Title I
Area or Area Office	Refers to the 12 regional administrative units of the Indian Health Service
FA	Funding Agreement, P.L. 93-638, Title V
FAA	Funding Agreement addendum, P.L. 93-638, Title V
AI/AN	American Indian and Alaska Native
BIA	Bureau of Indian Affairs
CDBG	Community Development Block Grant program of the Department of Housing and Urban Development
CFR	Code of Federal Regulations
COR	Contracting Officer's Representative; often, the Project Engineer
CPA	Certified Public Accountant
Criteria document	Indian Health Service. "Criteria for the Sanitation Facilities Construction Program." Latest copy.
CWA	Clean Water Act
CWF	Consolidated Working Fund account
DHEW	Department of Health, Education, and Welfare (now called DHHS or HHS)
DHHS	Department of Health and Human Services
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
DSFC	Division of Sanitation Facilities Construction, IHS
E.O.	Executive Order
EA	Environmental Assessment
EIS	Environmental Impact Statement
Environmental Review Manual	Indian Health Service. Environmental Review Manual. DEH, OEHE. March 1993.
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FAR	Federal Acquisition Regulation system
FGCA	Federal Grants and Cooperative Agreements Act (P.L. 95-224)
FMB	Financial Management Branch
FOIA	Freedom of Information Act
FONSI	Finding of No Significant Impact
FR	Federal Register
FY	Fiscal Year
GAO	U.S. General Accounting Office
Grey Book	Indian Health Service. "Guidance for Title I Self-Determination Contract Negotiations for the Sanitation Facilities Construction Program and/or Projects.." Latest copy.
HHS	Department of Health and Human Services
HIP	Home Improvement Program of the Bureau of Indian Affairs
HQ SFC Program	Headquarters Sanitation Facilities Construction Program, IHS
HQ	Headquarters
HUD	Department of Housing and Urban Development
IAG	Interagency Agreement
IHS	Indian Health Service
IMPAC	International Merchant Purchase Agreement Card; i.e., the Federal government credit card.
IPA	Intergovernmental Personnel Act - Temporary assignments of employees between federal agencies, State, local, Indian tribal governments, institutions of higher learning, and other eligible organizations.
ISDA	Indian Self-Determination Act, Title I, P.L. 93-638
ISDEA	Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended
MOA Guidelines	This document.
MOA	Memorandum of Agreement
NAGPRA	Native American Graves Protection and Repatriation Act

NAHASDA	Native American Housing Assistance and Self-Determination Act of 1996 (P. L. 104-330; 25 U.S.C. 4101 et. seq.)
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
O&M	Operation and Maintenance
OEHE	Office of Environmental Health and Engineering, IHS
OGC	Office of the General Counsel, HHS
OMB	Office of Management and Budget
OMB Circular A-87	Office of Management and Budget. "Cost Principles for State, Local and Indian Tribal Governments." Latest copy.
OPAC	Online Payment and Collection
OPDIVs	Operating Divisions
OPH	Office of Public Health, IHS
OSHA	Occupational Safety and Health Administration, U.S. Department of Labor
OTSG	Office of Tribal Self-Governance, IHS
P.L. 93-638	Indian Self-Determination and Education Assistance Act
P.L. 94-437	Indian Health Care Improvement Act
P.L. 100-713	Indian Health Care Amendments of 1988
P.L. 86-121	1959, authorization for the SFC Program in IHS
P.L. 103-399	Indian Lands Open Dump Cleanup Act
PDS	Project Data System
PFA	Project Funding Agreement
PHS	Public Health Service
POR	Program of Requirements
PSFA	Programs, Services, Functions, and Activities
RD	Rural Development Program, USDA
RFO	Request For Opinion. An opinion by the OGC which explains the specific points of law for Federal government program officials. The opinions are considered internal agency communications.
ROW	right-of-way
RUS	Rural Utilities Service of USDA RD (one of several agencies that were formerly Farmer's Home Administration)
SD/SG	Self-Determination/Self-Governance. Refers to tribes that assume responsibility for an IHS program under P.L. 93-638 Title I (SD) or Title V (SG).
SDWA	Safe Drinking Water Act
SFC	Sanitation Facilities Construction
SFCB	Sanitation Facilities Construction Branch, IHS
SFCP	Sanitation Facilities Construction Program, IHS
SHPO	State Historic Preservation Officer
Single Audit Act	Single Audit Act of 1984, Pub. L. 98-502, Oct. 19, 1984, 98 Stat. 2327 (31 U.S.C. Sec. 7501 et seq.)
Subpart J	Code of Federal Regulations, Title 25, Chapter V, Part 900, Contracts under the Indian Self-determination And Education Assistance Act (25 CFR 900); Subpart J--Construction, Sections 900.110 to 900.148.
TAC	Tribal Advisory Committee
TDHE	Tribally Designated Housing Entity (formerly Indian Housing Authority)
TERO	Tribal Employment Rights Office
THPO	Tribal Historic Preservation Officer
U.S.	United States government; Federal government
U.S.C.	United States Code, codification of the laws of the U.S.
USDA	U.S. Department of Agriculture
Yellow Book	Indian Health Service. Guideline for the Sanitation Facilities Construction Program under Self-Governance. Latest copy.

Memorandum of Agreement Guidelines

Indian Health Service Sanitation Facilities Construction Program

CHAPTER I. General Policies

Purpose of Guidelines

The purpose of this document is to set forth the policies and guidelines that the Indian Health Service (IHS) will use to enter into agreements with American Indian tribes, Alaska Native villages, and others for the provision of sanitation facilities and/or technical services as authorized by Public Law (P.L.) 86-121 (42 U.S.C. 2004a). The cooperative nature of a sanitation facilities project makes it essential that the parties involved have a clear understanding of the responsibilities they are undertaking in order to carry out the project. For each project, specific responsibilities are outlined in a Memorandum of Agreement (MOA). General responsibilities are outlined in this document in addition to specific requirements for utilization of the MOA. These guidelines complement the program document, Criteria for the Sanitation Facilities Construction Program.

- Chapter I provides an overview of the MOA, citing its authority, relationship to other procurement documents, methods of accomplishing work, method of project implementation, and general requirements for sanitation facilities construction projects.
- Chapter II discusses project development which includes policies for the methods of accomplishing work, profit and risk, and choice of work instrument.
- Chapter III outlines the general structure of the MOA document, required provisions, and procedures for implementing the MOA.
- Chapter IV details the administrative requirements for executing the MOA including accountability, roles of IHS personnel, standards, and procurement.
- Chapter V discusses the work method where IHS administers the project and executes the project by Federal contract or by force account.
- Chapter VI discusses the work method where a tribe administers the project including discussions of tribal force account and tribal procurement.
- Chapter VII discusses the work method where a third-party administers the project. Third-parties can include states, local governments, and non-profit organizations.

Scope of Guidelines

These guidelines are used by the Sanitation Facilities Construction (SFC) Program, Indian tribal leaders, and all other parties to an MOA including the IHS project engineer, IHS district staff, Area SFC Program staff, and personnel in tribal sanitation facilities construction programs. The guidelines will provide for a consistent and orderly approach in the utilization of the MOA for the provision of sanitation facilities and technical assistance to the American Indian and Alaska Native people and tribal governments nationwide. Any issues, circumstances, or questions that cannot be resolved using these guidelines should be referred to the SFC Program Director at the IHS Area Office, who will consult with IHS Headquarters as appropriate.

Sec. 1. Authority for the MOA: The MOA provides the IHS SFC Program with a unique instrument for providing assistance to tribes. The specific authority for the MOA is set forth in Section 7(a)(3) of P.L. 86-121 (42 U.S.C. 2004(a)(3)), which authorizes the Surgeon General:

" . . . to make such arrangements and agreements with appropriate public authorities and nonprofit organizations or agencies and with the Indians to be served by such sanitation facilities (and any other person so served) regarding contributions toward the construction, improvement, extension and provision thereof, and responsibilities for maintenance thereof, as in his judgment are equitable and will best assure the future maintenance of facilities in an effective and operating condition."

Section 7(a)(3) gave broad discretionary powers to the Surgeon General to carry out the mandates of P.L. 86-121. Most sanitation facilities projects are executed using an MOA, because it provides more flexibility than the traditional contracting process in arranging for contributions from non-Federal sources and in accomplishing the required sanitation improvement. The authority vested in the Surgeon General by P.L. 86-121 was transferred to the Secretary, Health, Education and Welfare (HEW), by Reorganization Plan No. 3 of 1966. The Secretary of HEW was redesignated Secretary of Health and Human Services by Section 509(b) of P.L. 96-88 in 1979. The authority was delegated to the Director, IHS, by the Reorganization Order of January 4, 1988 (52 FR 47053), which elevated the IHS to a Public Health Service (PHS) Agency. The authority was further delegated to Area Directors on March 3, 1995. (see Appendix E)

The relative simplicity of P.L. 86-121 resulted in the program moving forward without formal regulations, and none were ever developed. At the beginning of the SFC Program, guidance was provided in the document "Method of Conduct, Indian Sanitation Facilities Construction Activity," dated October 1959 and updated in August 1962. Further guidance was made available in the document "Criteria For Sanitation Facilities Construction," dated February 6, 1984, which was replaced by the Criteria for the Sanitation Facilities Construction Program (Criteria document) in June 1999.

(a) The IHS Sanitation Facilities Construction Program: Under the authority of P.L. 86-121 and the Indian Health Care Improvement Act (P.L. 94-437, as amended), the IHS implemented a program to provide essential sanitation facilities to eligible American Indian tribes and Alaska Native villages. The essential sanitation facilities that the IHS provides include domestic water supply, wastewater disposal, solid waste disposal facilities, and operation and maintenance equipment and training. The IHS also provides related services including engineering studies, testing, and housing site evaluations. The SFC Program was authorized in 1959 and is considered a fundamental element of the preventive health effort of the IHS direct health care delivery system. Congress reaffirmed the primary responsibility and authority of the IHS to provide the necessary sanitation facilities and services authorized by P.L. 86-121 in Section 302(b) of P.L. 94-437.

From 1959 through 2000, the IHS sanitation facilities construction program committed over \$1.5 billion for sanitation facilities projects and related services benefitting American Indians and Alaska Natives. Most of those projects were funded using MOAs signed by the tribe and other project participants. The Criteria document outlines the methodology for allocating IHS appropriated funds for sanitation facilities in support of housing projects and for sanitation facilities for regular projects.

Sec. 2. Implementation: The MOA is a legal instrument entered into by the IHS and the Tribe to create, fund, and sometimes construct, sanitation facilities projects authorized by Public Law 86-121. Other entities may be parties to the MOA, usually because they contribute funds to the IHS project; however, the MOA is the controlling legal instrument for the project because it is the only document that includes the agreed upon commitments of the IHS, the Tribe, and the other parties.

The MOA is an agreement between the IHS and one or more other parties which establishes a cooperative relationship among those interested parties in accomplishing work authorized under P.L. 86-121. The work can be funded using the MOA as the instrument to obligate sanitation facilities funds [see GAO report HRD-80-124 (B-197343), September 30, 1980 in Appendix C], or through other instruments, such as contracts, which are executed subsequent to the MOA.

In addition to identifying project funding arrangements, the purposes of the MOA include:

- Identifying the parties participating in a project and describing their responsibilities when performing the work described in the Project Summary which is an integral part of the MOA.
- Specifying the rules and procedures which govern the conduct of the parties in performing the work to complete the project.
- Designating the ownership of the completed sanitation facilities and designating the responsible party for operation and maintenance of the completed sanitation facilities.

When drafting the MOA, IHS Area SFC Programs must insure that the conditions written in the MOA are appropriate under IHS's authorizing statutes and that any functions, services, and activities assigned to the IHS are authorized under those statutes.

Almost every sanitation facilities project funded under authority of P.L. 86-121 has an MOA executed between the IHS and the group receiving the facilities or services, regardless of the source of the funds. Whether the funds used for the project are appropriated, transferred, or contributed to the IHS, if P.L. 86-121 is the authority for funding the sanitation facilities project, an MOA must be executed. One exception could be projects undertaken by tribes with self-determination agreements.

During the drafting of the MOA, the parties must agree on the method of accomplishing the work, because the method of accomplishing the work determines the provisions and conditions that are written into the MOA. The various methods are described in these guidelines with respect to the use of an MOA. Some methods, like force account construction, are covered in more detail, while methods such as government contracting, which have established regulations, are not covered.

(a) The Relationship of MOAs to Cooperative Agreements (See further discussion in Section 6.): P.L. 86-121 MOAs are most similar to cooperative agreements as defined by the Federal Grants and Cooperative Agreements Act (FGCA), P.L. 95-224, as amended (31 U.S.C. Sec. 6301 et seq.). P.L. 86-121 MOAs, like cooperative agreements, are not subject to the Federal Acquisition Regulation (FAR) system or departmental procurement regulations. A cooperative agreement is a legal instrument reflecting a relationship between the Federal Government and a recipient of Federal assistance (in the form of money, services, etc.) to accomplish a public purpose authorized by statute in which "substantial Federal involvement is anticipated" between a Federal agency and the assistance recipient (e.g., a tribe) during the performance of the contemplated activity. A cooperative agreement is not a contract; a contract is used when the principal purpose is to obtain property or services for the direct benefit or use

of the Federal government. The MOA is a legal fund transfer mechanism authorized by P.L. 86-121.

MOAs authorized under P.L. 86-121, do not fall neatly into the cooperative agreement classification and related regulations. Where appropriate, the concepts of regulations governing cooperative agreements were incorporated into this document to insure compatibility with those regulations, while preserving the uniqueness (e.g., flexibility) of the P.L. 86-121 MOA.

The MOA is used in the SFC Program because of considerable interaction and substantial involvement of the SFC Program staff with the recipient American Indian tribe and Alaska Native village during the performance of the project. That interaction between the IHS SFC Program and the tribe occurs when IHS provides or participates in some or all of the following: planning for or designing facilities; contracting for or supervising construction of facilities; assisting in the selection of contractors; coordinating or participating in the collection/analysis of data; providing training; reviewing and approving intermediate steps in the work; plan review and inspection; and providing technical management assistance.

In addition to sanitation facilities construction, the MOA may also be used to provide technical assistance and/or professional services from Federal employees or others, if they are related to the provision of sanitation facilities.

(b) MOA Participants: An MOA can be executed with, (1) any Federally recognized Indian tribe or Alaska Native Village, or Indian band, group, or community subject to IHS regulations on health care eligibility requirements, (2) appropriate public authorities; (3) nonprofit organizations, and (4) other agencies and units of the Federal government. Groups (2), (3), and (4) are considered "third-parties" and discussed further in Chapter VII. MOA's with public authorities and nonprofit organizations must be for the health benefit of eligible Indians and related to the provision of sanitation facilities and/or related technical services. Individual agreements with individual homeowners may be required in addition to the MOA.

The IHS must be consistent in the use of its legal obligating document, the MOA. IHS must be consistent in its relationships with other agencies, and it must be consistent in its use of the MOA from Area to Area. IHS's ability to continue to use a flexible MOA depends on that consistent implementation. The MOA is the obligating document between IHS and the Tribe, and the MOA may not enforce another agency's requirements. IHS is not authorized to enforce another agency's requirements; the other agency must do so in a separate agreement with the Tribe. P.L. 86-121 provides authority to IHS to enter into MOAs with tribes and other participants. Other agencies have their own authorities for entering into agreements with tribes; therefore, the other agency's requirements must not be in the MOA.

The IHS is not a grant or loan recipient, and IHS needs to completely separate itself from the other agency's loan or grant provisions. The other agency's loan or grant requirements should be in its grant or loan with the Tribe.

Including another agency's requirements in an MOA gives the appearance that IHS will enforce those provisions. IHS will work with the Tribe to insure that the Tribe's contract and other documents meet the conditions of their grant or loan. The other funding agency is responsible for enforcing its grant or loan conditions whether or not it signs the MOA.

The MOA is an agreement between IHS and the Tribe; sometimes a contributing agency signs the MOA. The grant or loan requirements are between the Tribe and the

contributing agency. The instruments for contributing funds include the IHS MOA, other agency grants or loans to the Tribe, and Interagency Agreements (IAG). Each of those instruments has a different purpose and is executed under different authorities. Each of those instruments--MOA, grant, loan, IAG--must remain separate to meet the requirements of each agency's separate authorities.

(c) Non-Specific MOA: (See also Chapter III, Section 2(e)) Some tribes, communities, and other organizations participate in several P.L. 86-121 projects during a fiscal year or within a three or four fiscal year period. The participation of these entities and the agreement provisions covering their participation are often identical for all projects. Some examples of these recurring activities include: Power-line extensions, archeological services, tribal procurement procedures, and multi-project MOAs for tribes using Subpart J construction contracts. Use of non-specific MOAs to define the scope/activities/relationships of the respective parties may increase efficiency and reduce paperwork for numerous specific projects which may follow. A non-specific MOA cannot obligate any project or other IHS funds or resources.

(d) MOAs For Pre-Project Planning: Standard Federal government procurement with project funds of materials or services for planning or developing future construction projects does not always require prior execution of an MOA. Examples would include procurement of materials in large quantities used for several projects, or aerial photography services. However, MOAs are required if the following apply:

- (1) Funds or resources are contributed from one governmental entity to another,
- (2) There is tribal involvement, or
- (3) The IHS and/or an IHS representative utilizes tribal lands/facilities/equipment; e.g., soil boring on tribal land.

(e) MOA Review and Approval: MOAs are approved and executed for IHS at the Area level by the Area Director. Copies of MOAs for projects exceeding \$1 million (total of all IHS and contributed funds) must be sent to the Director, HQ SFC Program, for oversight purposes. It is recommended that the Area send unusual or complicated MOAs and MOAs for unusual projects to IHS Headquarters for review prior to approval by the Area Director. All original executed MOAs must be retained at the Area office level.

(f) Prohibited MOA Uses: MOAs, authorized by P.L. 86-121, may only be used to provide items (including services) related to sanitation facilities serving Indian people. The MOA may not be used to allow a tribe or other MOA party to procure goods or services that will benefit the government, even if the procured goods or services are used to assist Indian people through the SFC Program. Federal government contracts and purchase orders must be used if the goods or services are procured for the direct benefit or use of the Federal government, as specified in the FAR. For example, an IHS office may not use an MOA to have a tribe procure or rent office equipment (e.g., computers, copiers) for use by government employees even if that equipment is used for administration of SFC projects. An MOA with a tribe may not be used to purchase meeting space for a meeting of only government employees or any meeting not required to provide sanitation facilities or technical assistance as described in the MOA. Renting meeting space for operation and maintenance (O&M) training might be acceptable if related to specific projects funded under P.L. 86-121.

MOAs may not be used to hire tribal or other non-federal employees as secretaries, clerk typists, draftsmen, engineering aides, engineering technicians, and other personnel to work in government offices or otherwise provide personal services to the Federal government. Any individual who represents the IHS, such as an inspector, and/or retains control or responsibility of any work on behalf of the government, must

be a government employee or its agent; the individual cannot be a tribal employee paid under an MOA.

Sec. 3. Administrative Provisions:

(a) Contributions: Most MOAs contain clauses that list the contributions that each MOA party will make to the project. These contributions may be in the form of funds, paid labor, voluntary labor, equipment, land, interests in land (such as easements and rights-of-way), and materials.

While P.L. 86-121 does not require contributions from the tribe or other non-Federal party to the MOA, the legislative history clearly indicates the intention of the Congress that the federal government seek contributions from the beneficiary of the sanitation facilities project and other parties:

In a hearing before a Subcommittee of the House Committee on Interstate and Foreign Commerce on May 1959, Dr. John D. Porterfield, then Deputy Surgeon General, testifying for the Department on bills to provide for the improvement of Indian sanitation facilities (which became P.L. 86-121) declared: "In the construction of Indian sanitation facilities it is anticipated that, for the most part, the Federal role will be one of planning, furnishing some of the materials needed, supervising the work, and educating the Indians in the utilization and maintenance of the facilities. Contributions of labor, materials, money or services would also be made by the Indians, and in some cases, by adjacent non-Indian communities and nonprofit organizations." With the enactment of P.L. 86-121 in 1959, Dr. Porterfield's statement about the roles of the Federal government, Indians, and others established the basic principle of the SFC Program.

The IHS Area Director will determine the type and extent of the contribution that is appropriate under the circumstances and will ensure the best use of IHS resources and the future operation and maintenance of the facilities.

(b) Indian Preference: The IHS must comply with the mandates of the Buy Indian Act, as amended (25 U.S.C. 47). The Act states that to the greatest extent feasible, all MOA parties including the tribe, tribal organizations, their contractors, and their subcontractors and suppliers shall give preference to Indians, Indian organizations, and Indian-owned economic enterprises on all employment and contracting opportunities. For Federal contracts executed subsequent to the MOA, the FAR contains more specific Indian preference requirements. Indian preference requirements applicable to tribal force account and procurement are discussed further in Chapter VI.

When IHS funds are pooled with funds from a non-Federal, non-tribal government, Indian preference shall be applied to the greatest extent feasible, except as prohibited by applicable law or regulation. If the non-federal, non-tribal government retains control of the funds, its Indian preference policy applies. In the absence of legal authority by that government to give Indians preference, it is considered "infeasible" to require the non-federal non-tribal government entities to mandate Indian preference (see also Chapter VII).

(c) Minimum Construction Standards: Minimum standards for construction, materials, and equipment will be established by agreement between the IHS and the MOA parties. In the absence of specified minimum standards for the project, the standards required for other IHS SFC projects within the IHS Area shall be used. For all SFC projects, plans and specifications or, at a minimum, a scope of work are required to identify exact technical requirements.

(d) Project Performance Monitoring: The cooperative nature of the P.L. 86-121 MOA method of accomplishing work requires close communication and project monitoring

by IHS personnel. Specific means of monitoring for each project will depend on the degree of participation by each party and the methods of accomplishing the work in accordance with the terms of the MOA. Monitoring of a project by IHS shall continue until IHS transfers the project and its interest to the tribe or other MOA party.

Sec. 4. Indian Self-Determination:

(a) Self-Determination: Under Title I (self-determination) of the Indian Self-Determination and Education Assistance Act (P.L. 93-638), a tribe may request to participate in a sanitation facilities construction project using a contract authorized under that title. For a 638 Title I tribe, the P.L. 86-121 sanitation facilities project funds and project-related program funds are paid to the Tribe on a project-by-project basis using construction contracts in accordance with the regulations at 25 CFR 900 Subpart J, or with Self-Determination MOAs under P.L. 86-121. Those contracts under Title I are also known as Subpart J construction contracts or Title I construction contracts or 638 construction contracts. Most 638 construction contracts for SFC projects are executed subsequent to an MOA with the tribe. Title I construction contracts are discussed in more detail in the Guidance for Title I Self-Determination Contract Negotiations for the Sanitation Facilities Construction Program and/or Projects or "Grey Book."

The Title I construction contract is the obligating document for sanitation facilities project funds when signed by the IHS Area Director (the contract is usually signed by the Area Contracting Officer also and in some cases, just the Contracting Officer). The IHS will monitor the progress of the sanitation facilities project through quarterly reports that the tribe submits. Payments to the tribe will be made quarterly based on the progress of the project.

(b) Self-Governance: Where the tribe is carrying out the activities of the IHS Sanitation Facilities Construction Program under a self-governance (SG) compact or addendum (Title V, P.L. 93-638), there are three ways to make funds available to SG tribes who will implement new sanitation facilities construction projects (authority is in parentheses):

1. Title I construction contract (Title I, P.L. 93-638)
2. Funding Agreement Addendum or Amendment (P.L. 86-121)
3. Construction Project Agreement (Title V, P.L. 93-638)

The instruments in item 2 are executed under the authority of P.L. 86-121 but are not considered to be MOAs. Normally, these guidelines do not apply to the construction of sanitation facilities under self-governance; however, an MOA may be required if other agencies contribute funds to the project. Additional guidance may be found in the Guideline for the Sanitation Facilities Construction Program under Self-Governance, also called the "Yellow Book," and in the Title V regulations (42 CFR Part 137, specifically, Subpart N Construction).

(c) Contributions from other parties. An MOA may be required for a project, if funds from other parties are contributed to the project and are administered by IHS. The MOA is the instrument for obligating those funds to the project and for designating the responsibilities of each party.

IHS may enter into a self-determination or self-governance agreement for funds appropriated to other agencies but administered by IHS, provided that those contributed funds meet two statutory criteria¹:

- (1) The funding program must be either administered for the benefit of Indians or be a program of which Indian are the primary or significant beneficiaries;
- (2) The funds must also be administered by the Secretary, Department of Health and Human Services (HHS).

Funds that another agency has already awarded or allocated to tribes, but then passed to IHS to give to the tribe are not considered to be "administered by the Secretary." If IHS accepts this type of contribution, which is not administered by the Secretary, then the MOA is the only instrument that may be used to transfer funds to the Tribe.

Sec. 5. Waivers to MOA Guidelines: These guidelines are based on Federal laws and regulations. Any waiver from these guidelines shall not be made without the written consent of the Director, Office of Environmental Health and Engineering (OEHE), IHS HQ, who will consult with the appropriate knowledgeable individuals within the HHS.

Sec. 6. Brief Overview of Federal Procurement: This section does not describe every type of contract or agreement that may be executed by the Federal Government. Laws other than those described below may authorize agencies to execute legal documents which do not fall neatly into one of these categories or may exempt a class of agreements from the Federal Grant and Cooperative Agreement Act; e.g. the MOA. The specific law that authorizes an agency's activities will always take precedence over the more general principles discussed in this section.

(a) The Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. Section 6301, et seq.) defines the types of legal instruments that a Federal agency normally uses to transact its business and provides general guidance on their use. The three types of instruments defined are procurement contracts, grants, and cooperative agreements. The instrument used depends on the principal purpose of the transaction; i.e., whether the Government is primarily interested in acquiring goods and services or in providing assistance to a recipient authorized by law to receive such aid.

(1) Federal procurement contracts are used when the principal purpose is to acquire property or services for the direct benefit or use of the Government. These contracts are subject to the HHS acquisition regulations at 48 CFR Chapter 3. " 'Contract' means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited

¹25 U.S.C. 450f(a)(1)(D), which states: "The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs . . . administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior;"

25 U.S.C. Sec. 458aaa-4(b)(2)(G), which states: The Secretary may enter into a Self-Governance agreement with a qualified tribe for ". . . all programs, services, functions, activities (or portions thereof), . . . with respect to which Indian tribes or Indians are primary or significant beneficiaries, administered by the Department of Health and Human Services through the Indian Health Service . . . under the authority of . . . any other Act of Congress authorizing such a program, service, function, or activity (or portions thereof) carried out for the benefit of Indians under which appropriations are made available to any agency other than an agency within the Department of Health and Human Services, in any case in which the Secretary administers that program, service, function, or activity (or portion thereof)."

to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, et seq."² An example of Federal procurement is the purchase of personal computers for use by IHS employees for office administration or project administration with a government IMPAC card.

(2) Grants are used between the Federal Government and a non-federal entity when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support, authorized by law. No substantial continuing involvement of the government is expected in carrying out the activity covered by the grant. Grant authority must be specified by law; e.g., EPA Indian set-aside grants under the Clean Water Act and Safe Drinking Water Act.

(3) Cooperative agreements are used between the Federal Government and a non-federal entity when the principal purpose of the relationship is to transfer a thing of value to the recipient to carry out a public purpose of support, authorized by law, and substantial involvement is expected between the Government and the recipient in carrying out the agreement.

(b) The Indian Self-Determination and Education Assistance Act, P.L. 93-638 as amended and P.L. 86-121 created other instruments for IHS to use besides those listed above:

(1) P.L. 93-638 Title I construction contracts. Section 105(a) of P.L. 93-638, as amended, states that Federal contracting laws do not apply to 638 Title I construction contracts, and it restricted the applicability of the FAR subject to negotiation with the tribe or tribal entity.

(2) P.L. 93-638, Title V. Tribes may also perform construction projects under Title V of P.L. 93-638, as amended, which replaced Title III; however, Title V construction projects are administered under the Title V regulations and are beyond the scope of this document.

(3) P.L. 86-121 MOA, the subject of this document. The P.L. 86-121 MOA resembles a cooperative agreement in its principal purpose; however, it also includes characteristics of the other two instruments listed in (a).

(c) The issue of ownership of the facilities constructed with federal funds has evolved due to the 1994 amendments to P.L. 93-638. Additional information is found in the Criteria document.

(1) For most Federal Government agencies, goods and services obtained with a Federal procurement contract belong to the Government, and if authorized, the agency may and must formally transfer ownership to a non-governmental entity such as a tribe. Formal transfer of ownership is needed, if:

(A) the sanitation facilities, provided in accordance with an MOA, are constructed under an IHS Federal procurement contract, or

(B) some of the materials, supplies, or equipment were purchased by IHS.

(2) Under a grant, the non-governmental recipient owns the good or service obtained with the grant, since the Government is usually not involved in the project after the grant is awarded.

²FAR 2.101

- (3) Under a P.L. 93-638 Title I construction contract, the proposed facilities belong to the Tribe unless the contract states otherwise.

Keep the discussion in this section in mind as you review the next chapters on the different delivery methods available to the IHS SFC Program.

CHAPTER II. Project Development

Sec. 1. Methods for Accomplishing the Work: The purpose of a SFC project is to provide to the American Indian and Alaska Native people assistance in the form of projects to provide either services or facilities or both. The MOA establishes the project relationship between the Federal government, a tribe, and other parties; the methods of accomplishing the project work include contracts and force account. The Federal government may do the work with Federal procurement contracts for materials and services and by force account using Federal employees for labor. The Tribe or a third-party could do the work with their own force account labor and procurement practices. The SFC Program uses all those methods. (See Fig. 2-1)

The MOA for every IHS SFC project describes the cooperative relationship among all parties and describes how the work will be accomplished. The choices or methods for accomplishing the work are as follows:

1. Direct Provision by the IHS
 - Federal procurement
 - Open market Federal contract
(includes Buy-Indian contract)
 - P.L. 93-638 construction contract (Title I)
 - Government Force Account
2. Direct Provision by a Tribe
 - Tribal Force Account
 - Tribal Procurement
3. Direct Provision by a Third-party
 - Third-party Force Account
 - Third-party Procurement

(a) Direct Provision By the IHS: This method of accomplishing work includes Federal contracts with tribes or others and force account where the work is done by Federal workers. The products of contracts (goods and services) are transferred to the American Indian or Alaska Native community or other responsible non-Federal entity.

(1) Federal Procurement: Federal contracts are used when the Federal Government plans to acquire property, services, resources, or studies for its own use or direct benefit, and those contracts are regulated by the FAR. The sanitation facilities procured by IHS with a contract belong to the Federal government and may be transferred to an American Indian or Alaska Native community or other responsible non-Federal entity upon project completion. The IHS SFC Program uses two types of contracts for sanitation projects; open market contracts which include Buy-Indian contracts and 638 construction contracts. Contracts with tribes for construction of all or part of the facilities described in the MOA are often awarded after the MOA is signed—the signed MOA obligated the project funds for sanitation facilities to be provided by IHS, then IHS contracted with the Tribe (as the contractor) to construct the project.

(A) Open market Federal Contract: In a fixed-price contract, the contractor assumes the risk for non-performance and can make a profit; however, the government may require bonds or other assurances of performance (see Chapter V, Section 1). A contract may be restricted to a class of contractor, such as Indian contractors (Buy-Indian) or small business enterprises.

(B) P.L. 93-638 construction contracts: (See Chapter V, Section 1) Under P.L. 93-638, the IHS is required, upon the request of any Indian tribe or tribal organization, to evaluate entering into a contract with that organization to carry out any or all IHS programs, services, functions, and activities; this evaluation is subject to applicable regulations (42 CFR Chapter I, Part 36, Indian Health). Most 638 construction contracts for SFC projects are executed subsequent to an MOA with the tribe. Most 638 construction contract provisions generally follow the FAR except as prescribed by Subpart J (25 CFR 900, Contracts under the Indian Self-determination and Education Assistance Act; Subpart J--Construction). For example, 638 construction contracts may be negotiated without advertising. In a fixed-price 638 construction contract, the tribe assumes some risk in that it must perform at the price negotiated until the work is complete, or the tribe requests retrocession³. If a contract retrocedes to the IHS and costs incurred exceed budgeted amounts, the scope of the project(s) may be reduced. The 638 construction contracts for construction of sanitation facilities are executed on a project by project basis and generally are fixed price.

(C) Government Force Account: In general, force account refers to work done without prior contractual agreement, and the cost of labor, materials, equipment, insurance, and miscellaneous support costs are charged to the project account. In the SFC Program, government force account work is performed by government employees under the direction of an IHS construction supervisor. Under an MOA, the IHS may elect to use Federal employees to construct all or part of the project. IHS schedules the work, assures quality control, and may provide procurement, equipment, and arrange transportation. The Tribe may provide skilled or unskilled workers to work with Federal employees on the job site; however, there are restrictions on IHS supervision of tribal employees. IHS activities at the job site are discussed in more detail in Chapter V, Section 2.

(b) Direct Provision by Tribes: Under this method of accomplishing work, funds are obligated by the MOA. Then, as agreed upon in the MOA and in accordance with a payment schedule and upon request, the obligated funds are contributed to the Tribe; and the Tribe constructs or procures the sanitation facilities. [Note: This differs significantly from the situation described in (a)(1) where a tribe contracts with the Federal government to provide the facilities, after the MOA is signed. In the method described in (a)(1), the tribe is providing the goods and services to the Government, and the Government in turn transfers the goods and services back to the Indian people. Refer to Chapter V, Section 1 on contracts between the Federal Government and tribes.]

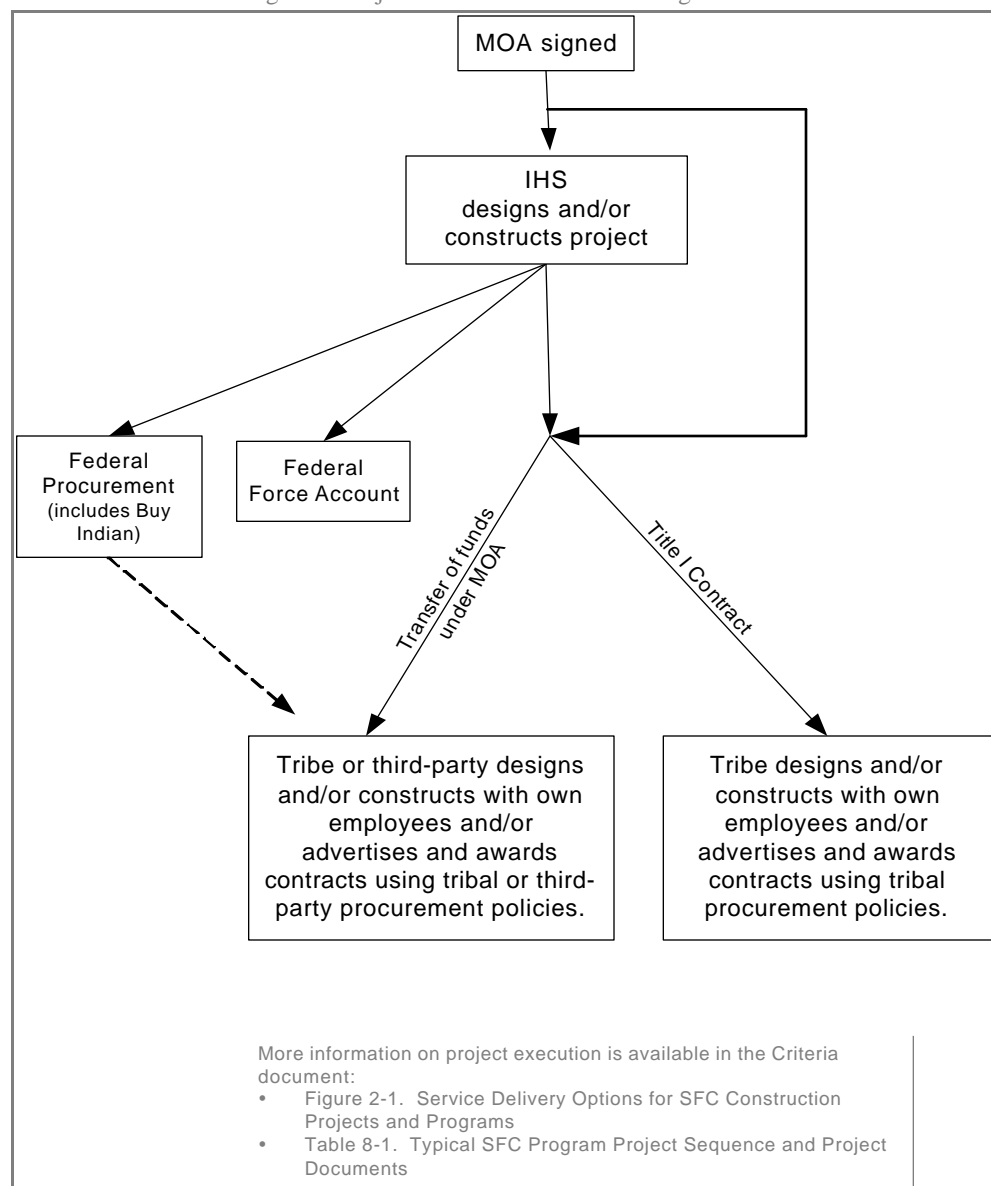
(1) Tribal Force Account: In a Tribal force account project, the tribe accomplishes the work with tribal employees directed by a tribal construction supervisor who has control of the project at the construction site. Typically, the tribe manages the project funds and provides the equipment, materials, and support. The IHS role includes providing technical assistance and inspection for quality control during construction (as well as applicable items described in Chapter I, Section 2(a)). Job-site technical guidance (but not supervision or control) may be provided by a government employee, if the tribe and IHS decide to utilize this approach to construction. In a tribal force account situation,

³Retrocession means a Self-Governance Tribe returns to the Secretary the programs, services, functions, and activities that are included in a compact or funding agreement, for any reason, before the expiration of the term of the compact or funding agreement.

ownership of the facilities, materials, and supplies purchased by the tribe with MOA funds vests with the tribe upon acquisition of materials and installation of the facilities. Refer to Chapter 6, Section 1.

(2) **Tribal Procurement:** Where sanitation facilities are procured by the tribe (i.e., the tribe contracts with another entity to construct the sanitation facilities), ownership vests in the tribe upon final acceptance of completed construction from its contractors. The tribe may transfer individual facilities to homeowners. Refer to Chapter 6, Section 2.

Fig. 2-1. Project Execution after MOA is signed



(c) Direct Provision by a Third-party: For various reasons, a third-party may decide to participate in the sanitation facilities project. Third-parties can be States, counties, municipalities, housing authorities, rural water districts, non-IHS Indian health clinics, or other non-profit organizations as defined in Chapter I, Section 2(b). If a third-party procures the sanitation facilities, ownership vests in the third-party upon final acceptance of the completed construction from its contractor. In accordance with the MOA, the third-party may own and operate the facilities or transfer the facilities to the tribe or to individual Indian recipients.

(1) Third-party Force Account: If the third-party has the capability to construct the sanitation facilities with its own employees, the MOA parties may choose to allow the third-party to perform all or a portion of the project with IHS funds. The IHS role could include providing technical assistance and inspection to assure quality control during construction. In a third-party force account situation, ownership of the facilities vests with the third-party upon acquisition of materials and installation of the facilities. In the MOA, the third-party may agree to transfer the facilities to the tribe or individual Indian recipients. Refer to Chapter VII.

(2) Third-party Procurement: A third-party to an MOA may use IHS funds to procure the goods and services authorized under P.L. 86-121 to benefit the Indian people. Refer to Chapter VII.

Sec. 2. General Concepts of Profit and Risk:

(a) Profit: Profit is not allowed under an MOA. When IHS contributes funds to an MOA party, that party may not earn a profit from those funds even if that party is a tribe. Any MOA funds remaining after the project is complete must be returned to the contributors or IHS unless those remaining funds are applied towards a mutually amended scope of work as described in an amended MOA approved by all affected parties. This is not to be confused with profit which is allowable under a contract subsequent to the MOA between the IHS and an MOA party.

(b) Risk: MOA parties might share in four types of risk. The extent of the risk depends on the type and extent of participation by each party, and some types of risk may not always be apparent or applicable. The types of risk are described below:

(1) Reduced Project Scope or Incomplete Project: An MOA establishes a cooperative relationship for accomplishing the project. The risk assumed by the MOA parties who contributed to the project described in the Project Summary is limited under the cooperative MOA relationship. All MOA parties share the risk that the project will not be completed as intended, and the full benefits of the proposed project may not be realized. For example, if the project costs more than available or obligated funds, the assistance recipients may have to accept a reduced scope of work or a cancellation of the project.

(2) Loss of Contribution: This type of risk borne by the MOA parties is limited to complete loss of that party's fund contribution toward the project, as outlined in the MOA. If the assistance recipient also made an in-kind contribution toward a project that later was cancelled, the assistance recipient would not get reimbursed for its in-kind work.

(3) Liability for Damages: The liability assumed by each MOA party depends on the functions they performed under the MOA. Each MOA party is responsible

for damages due to its own negligence (torts⁴). For example, when a tribe wants to construct a project using its own employees (tribal force account), the tribe assumes a significant liability (risk) for damages to public facilities and injuries to bystanders and workers. To cover those risks, the tribe should carry applicable liability insurance and workmen's compensation coverage (and may be required to carry coverage in the MOA).

(A) Federal Tort Claims Act (FTCA)⁵: The FTCA provides immunity from personal liability for federal employees **acting within the scope of their federal employment**. The FTCA makes suit against the United States the exclusive remedy available for "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment."⁶

(B) The FTCA covers acts performed by a tribe or its employees in carrying out a self-determination construction contract, Pub. L. 101-512 §314 (1990), or self-governance construction project agreement. [25 U.S.C. §458aaa-15(a)]. The FTCA coverage does not imply that IHS has a duty to oversee safety on the construction site. Instead, it provides that the Department of Justice will defend the tribe against claims arising from the performance of construction, including claims arising from the tribe's performance or nonperformance of the tribe's duty to oversee safety at the construction site, so long as those claims fall within the criteria of the FTCA. The FTCA coverage does not include general contractors. [28 U.S.C. §2671]. [RFO 11-8-01]

(C) The FY 1995 appropriation act⁷ for IHS gave the agency authority to enter personal services contracts; however, FTCA coverage is limited to individuals providing health care services within the scope of their employment under these types of contracts.⁸ Personal service contracts associated with construction services (e.g., construction inspectors) would not be covered by FTCA; therefore, the personal services contractor should, where necessary, obtain appropriate liability coverage.

(4) **Contractual Non-performance**: If a tribe elects to provide the sanitation facilities through a contract with the Federal Government, the tribe may be allowed the opportunity to earn a profit (depends on type of contract; e.g., fixed-

⁴ Torts are civil wrongs that are recognized by law as grounds for a lawsuit. Those wrongs result in an injury or harm which constitute the basis for a claim by the injured party. While some torts are also crimes punishable with imprisonment, the primary aim of tort law is to provide relief for the damages incurred and deter others from committing the same harms. The injured person may sue for an injunction to prevent the continuation of the tortious conduct or for monetary damages including both present and future expected losses. Torts fall into three general categories: intentional torts; negligent torts; and strict liability torts (e.g., defective products). A tort differs from a breach of contract in that the legal duty breached by the tort is one imposed by the state, whereas in a breach of contract, the obligation breached is one which the contracting parties have voluntarily assumed by signing the contract. [The Legal Information Institute]

⁵ 28 U.S.C. Sections 2671-2680

⁶ 28 U.S.C. Section 2679(b)(1)

⁷ Department of the Interior and Related Agencies Appropriations, 1995, P.L. 103-332, 108 Stat. 2499, 2527 (1994).

⁸ *ibid.* "(d) individuals providing health care services pursuant to these [personal services] contracts are covered by the Federal Tort Claims Act."

price vs. cost-reimbursement). With the opportunity to earn a profit comes the risk associated with having to perform in accordance with the provisions of the contract. Inability to perform may cost the tribe more than loss of its profit, including any additional procurement costs to satisfy its contractual obligation to the Federal Government.

Sec. 3. Choice of Work Instrument: On most IHS SFC construction projects, the MOA establishes the relationship among the participating parties, is the comprehensive agreement among all involved parties, and establishes the method of accomplishing the work. IHS policy on choosing the method of accomplishing the work requires a determination by the IHS and the tribe of the best approach and the relative capacities of the tribe, IHS, and others to perform the required project tasks. The key factors in the decision are (1) the desires of the prospective MOA parties, (2) the number and type of funding sources, (3) the business management practices and capabilities of the MOA parties, (4) the time available to accomplish the work, and (5) the past project performance history of the MOA parties. The objective of minimizing IHS involvement in the procurement actions of the tribe or other entities should also be a consideration in this decision. For each project, the ultimate decision to use any of the instruments cited in Section 1 is made by each IHS Area Director in accordance with these guidelines and in consultation with the Area SFC Program.

The flexibility of the MOA allows the tribes to participate to the fullest extent possible in the project to provide their sanitation facilities. The MOA allows the IHS to pursue the guiding principles of its management strategy of including the tribes in planning, procuring, construction, and evaluation. Using the MOA for tribal procurement allows tribes to be involved in procuring needed materials and services for their people. The government benefits by encouraging tribal self-governance while increasing tribal administrative capability which is an express Federal policy.

CHAPTER III. MOA Structure and Procedures

Sec. 1. MOA Structure

(a) Required MOA Format: At a minimum, each MOA will contain five basic sections: heading, preamble, agreement provisions, signature block, and project summary. The following is a brief description of each section. More specific details on required MOA clauses and recommended language are in Appendix A. Required sections include:

(1) Heading: Sets forth the title of the document and identifies the organizations or agencies that are party to the agreement.

(2) Preamble:

- (A) Identifies the officials who are executing the agreement on behalf of the parties,
- (B) cites the legal authority (P.L. 86-121) under which IHS will execute the agreement,
- (C) incorporates the Project Summary by reference with exact title and date, and
- (D) describes the background and purpose of the agreement.
- (E) Where appropriate, the preamble will also include the legal authority of other public authorities.

(3) Agreement Provisions: Identifies the specific and authorized responsibilities of all parties to the agreement and the extent of participation of all parties to the agreement. [see (b) below]

(4) Signature Blocks: Provides for the signature and date of all parties to the agreement and, where appropriate, cites the authorization permitting the person to sign on behalf of their respective organization or agency (unless cited in the Preamble).

(5) Project Summary: The important point to keep in mind is that MOAs executed in connection with P.L. 86-121 projects are based upon a plan of action outlined in an approved Project Summary:

- (A) Without the Project Summary, many of the provisions of the MOA would be meaningless. For that reason, the Project Summary is, by reference, incorporated into the MOA and is an integral part of it.
- (B) Therefore, it follows that the two documents should be consistent with one another and as complete as circumstances indicate.
- (C) Accordingly, when drafting and amending MOAs, the contents of the Project Summary must be thoroughly reviewed. If the Project Summary does not truly reflect the intentions of the parties, a revised Project Summary is required.

The Project Summary outlines a plan of action, alternatives considered, and engineering cost estimate to provide the sanitation facilities and technical assistance referenced by the MOA and includes a review and evaluation of potential environmental and cultural preservation requirements and issues that must be considered (e.g., NEPA, NHPA, ESA, etc.).

(b) Required MOA Agreement Provisions: The required provisions for MOAs are listed below. Additional provisions may be required depending upon who controls the funds and the method of accomplishing the work. MOAs for pre-construction planning activities need only contain the applicable provisions (see Appendix A).

- (1) Permission to enter upon tribal lands (tort claims);
- (2) *Designation of party(s) responsible for rights-of-way;
- (3) *Environmental and cultural requirements and responsibilities;
- (4) Contributions and commitments of each party (monetary and non-monetary), including any project technical support amounts (see Chapter 9, Section VI in the Criteria document);
- (5) *Fund control/expenditure provisions/cost principles;
- (6) Method(s) of accomplishing the work;
- (7) Authorized representatives for each MOA party;
- (8) Degree of involvement/control by each party;
- (9) *Minimum construction standards, if tribe or third-party doing the work.
- (10) *IHS Role in construction inspection. [see (c)(2) below]
- (11) Ownership and transfer of facilities/services/Federal interest;
- (12) *Responsibility for operation and maintenance; development and enforcement of operation and maintenance ordinances;
- (13) Specific performance periods, project schedule;
- (14) Termination for inactivity;
- (15) *Standard Termination Procedure [see Section 2(g)]
- (16) *IHS MOA dispute resolution.

*Additional provisions required for sanitation facilities construction projects.

(c) Provisions for Tribal Procurement:

(1) Technical Assistance: The MOA is the authorizing document for providing technical assistance, providing technical services, and identifying IHS oversight procedures. The exact methods of work, degree of involvement by each party, and IHS responsibilities for technical assistance and technical supervision must be adequately detailed in this document to minimize agency liability and eliminate the possibility of individual employee liability. Using "as necessary" in combination with statements about the method of work or that IHS may or will provide technical assistance as necessary is not adequate.

(A) Do not include work items in the MOA that the IHS is not authorized to provide.

(B) Separate Responsibilities: IHS employees cannot represent the tribe, and tribal employees cannot represent the IHS. An explicit statement to this effect should be included in the MOA and a similar statement should be included in the tribe's construction contract.

(C) No Contractual Relationship: Technical services, technical assistance, or oversight responsibilities outlined in the MOA and provided by IHS staff cannot create or appear to create a contractual relationship with the tribal contractor, supplier, or other entity which is not a party to the MOA.

(2) MOA Provisions on IHS Inspection: The MOA must clearly identify the IHS role in construction inspection and require that tribal procurement documents also include the right of IHS employees to inspect the work. References to IHS rights and responsibilities should not identify specific individuals by either job title or name.

Sec. 2. MOA Procedures

(a) Document Disposition: The Area Office is the repository for all original project documents. Copies will be provided to all parties of the executed MOA.

(b) MOA Initiation: Projects are usually initiated by a request from an American Indian Tribe or Alaska Native Community eligible to receive assistance from IHS under current eligibility criteria. The project request is submitted on a standard form (Project Proposal form, IHS-62) or as a letter which provides the same information as the standard form. The primary purpose of the form or letter is to document the request for IHS assistance. All such proposals must be acknowledged by the Area, and a notice of receipt sent back to the initiator.

The standard form or the request letter are the basis for preparing project documents. The Area may use tribal forms and letter requests as the basis for preparing project documents, when accepted by the appropriate Area official as an official request. When acknowledging receipt of the project proposal document, the response should be signed by the appropriate IHS official as designated by Area policy.

If the IHS decides to fund or otherwise participate in a project using project priority guidelines, the IHS will initiate consultations with the prospective MOA parties and prepare the draft MOA for review. (Note: P.L. 86-121 projects are discretionary; they are not an entitlement and are not competitive.) Attached to the MOA and incorporated into the MOA by reference is the Project Summary document which specifies the recommended project scope and estimated cost.

(c) Signatures: One original signature copy of the MOA, each with an attached copy of the Project Summary, will be circulated by IHS to all the parties to the agreement for signature approval. The authorized representative of each party will sign each MOA copy signifying approval of the recommended project and committing that party to the terms of the MOA. IHS will distribute copies of the fully executed MOA and Project Summary to each party to the MOA.

(1) Last Signatory: When IHS appropriated funds are committed to a sanitation facilities construction project, the last signatory to the MOA document shall routinely be the IHS Area Director. Exceptions include: On letter amendments for minor modifications, the IHS Area Director may sign the letter prior to receiving concurrence and signature from other parties. The letter amendments should include this or a similar statement: "It is understood by all parties that this agreement is contingent upon the approval and the execution of this agreement by all parties."

(2) Project Approval: All parties to the MOA except the IHS may sign the MOA before the IHS Area Director approves the project (by signing the Project Approval form) under the following conditions:

(A) The Project Summary has been reviewed and approved by the Director, Division of Sanitation Facilities Construction (DSFC) of the Area and is available for review by each person signing the MOA.

(B) The MOA includes this or a similar statement: "It is understood by all parties that this agreement is contingent upon approval of this project by the IHS Area Director or his designee, and execution of this agreement by all parties."

The objective is to allow Areas to submit the Project Approval form and MOA to the Area Director for signature as one package. In addition, it may reduce the

number of field visits by IHS staff to various organizations to discuss Project Summaries and MOAs and to obtain signatures on project documents.

An example of the Project Approval form is in the appendix of the Criteria document.

(d) MOA Contributions and Obligations: The sources of funding for sanitation facilities construction projects include congressionally appropriated funds, contributed funds from other Federal agencies, contributed funds from tribes, and contributed funds from other non-Federal entities. The MOA sets forth the respective contributions to be made by the MOA parties toward construction of a particular sanitation facilities project and is the instrument for obligating those contributed and appropriated project funds.

Depending upon the source of funds, the IHS SFC Program must use the appropriate method of accomplishing work as shown in Figure 3-1. Note that Federal procurement is always an option.

- Figure 3-1 A, typifies the traditional SFC project or direct service approach.
- Figure 3-1 B, shows the SFC project funded fully or partially, with or without the addition of IHS funding, by direct contributions from other Federal agencies. This type of project includes funds contributed from HUD/NAHASDA and EPA ISA programs. Only funds from HUD are specifically authorized by law⁹ to be administered by IHS.
- Figure 3-1 C, includes the situation where another Federal agency provides a grant or loan directly to a tribe and, subsequently, the tribe contributes the funds to an IHS SFC project. Because the Tribe and the funding agency actually administer those grant or loan funds, P.L. 86-121 is the only authorized method of accomplishing the work.

Since the MOA is the instrument that obligates¹⁰ sanitation facilities construction project funds, the total dollar amount of project funding from all sources must be explicitly stated in the MOA including design, support account, and construction amounts.

If part of or all of the funding for any project is from IHS appropriations, the maximum amount of IHS funds as stated in the MOA (not to exceed the funds available) shall be obligated with the MOA upon project approval and IHS funding. Funds transferred to IHS from other Federal and non-Federal entities as project contributions shall be obligated when received. The Area Financial Management office should be advised of the amount of funds committed.

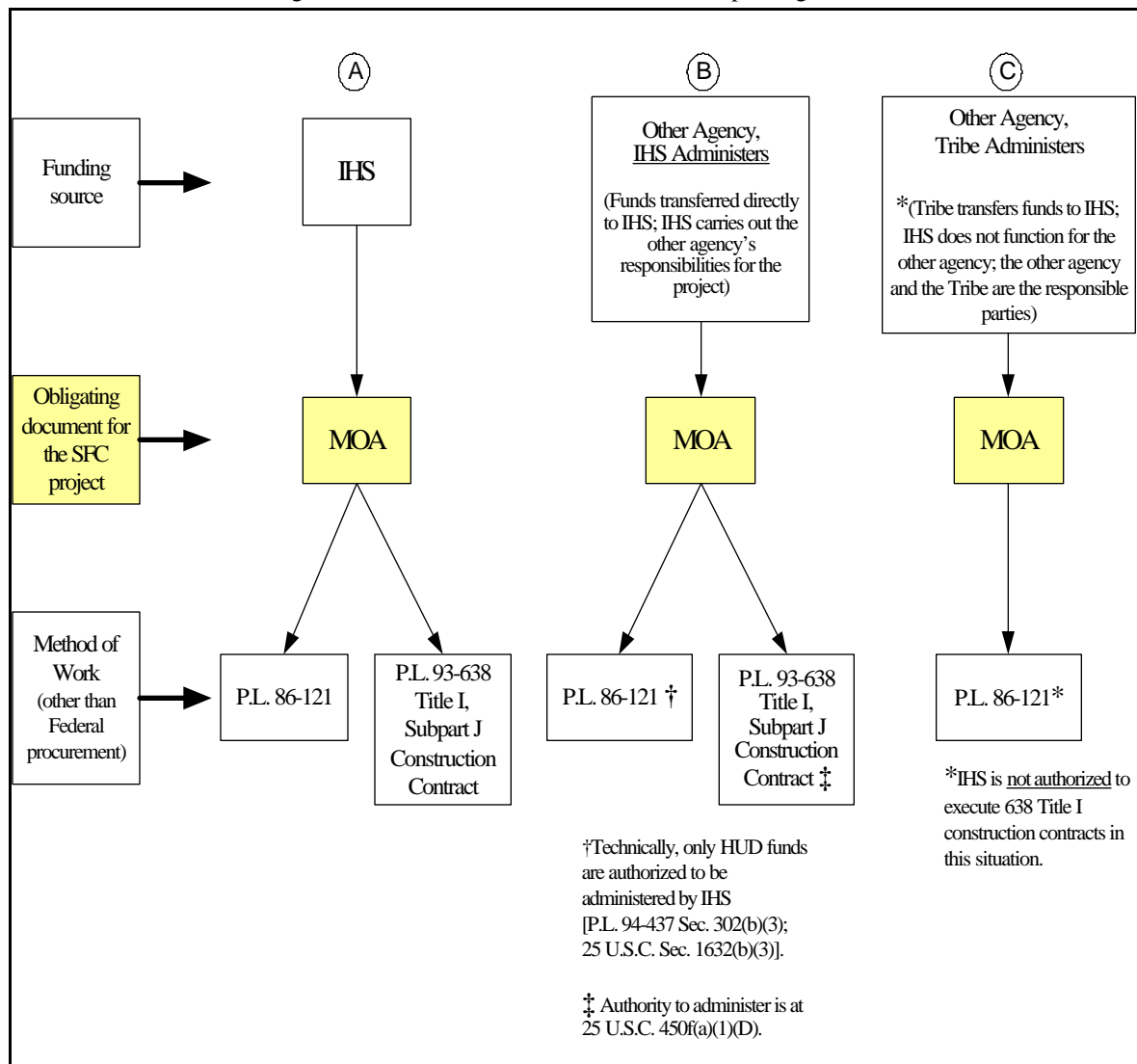
⁹25 U.S.C. Sec. 1632(b)(3) Notwithstanding any other provision of law - (A) the Secretary of Housing and Urban Affairs is authorized to transfer funds appropriated under the Housing and Community Development Act of 1974 (42 U.S.C. 5301, et seq.) to the Secretary of Health and Human Services, and
(B) the Secretary of Health and Human Services is authorized to accept and use such funds for the purpose of providing sanitation facilities and services for Indians under section 2004a of title 42 [this cite is P.L. 86-121].

¹⁰Under Federal law on obligation of appropriations, an "obligation" is some action that creates a liability or definite commitment on the part of the government to make a disbursement at some later time. The law also precludes an obligation unless it is supported by documentary evidence of a binding agreement between the parties; a binding agreement need not be a formal contract. The primary purpose is to require that there be an offer and an acceptance imposing liability on both parties. "The statute [31 U.S.C. Sec. 1501] requires documentary evidence of a binding agreement for specific goods or services. An agreement that fails this test is not a valid obligation." [GAO, Principles of Federal Appropriations Law, Vol. II, Chap. 7.] Therefore, the MOA with attached Project Summary together provide the "documentary evidence," "binding agreement," and "specific goods or services."

Normally, that maximum contribution amount must be recorded as an obligation; however, the contribution of funds can be conditional in the MOA (e.g., conditional upon IHS receiving a specific amount from a specific agency). Depending on the project specific circumstances and the conditional statements, some or all of the intended contribution may constitute a commitment upon approval of the project. For example, the Rural Development (RD) program may provide a loan to the Tribe for a sanitation facility, if IHS supports the Tribe's efforts. In the MOA, the Tribe agrees to contribute a specific dollar amount to IHS for the cost of project support and inspection services. Since the fund transfer did not take place at the time the MOA was signed, those funds cannot be obligated; however, the signatures of the parties commit them to providing the goods and services described in the Project Summary and MOA.

If the executed MOA contains provisions for a fund contribution from IHS to another party, the party that will receive and administer the funds must request the funds in writing in accordance with the provisions of the MOA and these guidelines. The total of all fund contributions cannot exceed the amount stated in the MOA. The MOA must specify the maximum amount of funds as a specific dollar amount that may be contributed by the IHS to the tribe, community, or other organization for the purposes specified in the MOA.

Fig. 3-1. Authorizations for Methods of Accomplishing the Work



(1) Requests for the funds identified in the MOA should be sent to the appropriate IHS field office and forwarded to the Area office SFC Program Director with appropriate documentation and approval recommendations as required by the Area office guidelines.

(2) MOA contribution requests may be processed only after the Area SFC Program Director signs the appropriate document for the disbursement. [See also Chapter VI, Section 3(a)(2)]. The Tribe or other MOA party will be given copies of Office of Management and Budget (OMB) A-87 (see Appendix D) and applicable copies of sections of these guidelines when funds are transferred to them.

(e) Non-Specific MOA: (See also Chapter I, Section 2(c)) A non-specific MOA does not obligate any IHS project or other funds or resources. A non-specific MOA must include provisions which clearly indicate the following:

(1) All actions and/or fund obligations must be activated by clauses in an MOA executed for implementation of a specific project.

(2) The non-specific MOA will be renewed at intervals which do not exceed five years.

The project MOA which implements actions and/or fund obligations must reference the applicable non-specific MOA.

(f) MOA Amendments: Amendments to the MOA can be initiated as necessary. All affected parties to the original MOA must approve and sign any subsequent amendments; all other parties should be notified. An MOA must be amended if any of the following conditions apply: (1) the scope of the project as described in the Project Summary changes significantly; (2) additional funds in excess of the amounts stated in the MOA are required to complete the project; (3) the method of accomplishing the work changes significantly, and (4) any other MOA provisions are modified.

(1) Letter Amendments: Whenever field conditions or changed circumstances make necessary a change in plans or in the agreed upon conduct of the project, modifications to the basic MOA shall be executed. Where the changes affect only the commitments of the parties, only a modification of the basic MOA is necessary. If there is a change in the scope of the project, both the MOA and the Project Summary must be amended. In most instances, minor modifications can be executed by an MOA letter amendment or combined Project Summary and MOA (PS/MOA) letter amendment, as appropriate, and signed by all affected parties. The PS/MOA letter amendments should include the applicable and appropriate changes to the information listed in Chapter 8, Section I of the Criteria document. Copies of amendments should be attached to the original copies of the MOA to prevent later misunderstandings.

(g) Standard MOA Termination Procedure: The standard MOA termination procedure is as follows: An MOA party may terminate its relationship with the other MOA parties prior to project completion upon 30 days advance notice in writing to all other parties. If the MOA is terminated by all parties prior to completion of the project, all unexpended funds will be returned to the contributors in a prorated manner and in accordance with the transfer provisions in the MOA. All in-place sanitation facilities will be transferred to the tribe or other party as designated in the MOA. The IHS may elect to transfer or retain any or all unused materials and equipment purchased with IHS funds and may request the Tribe transfer to IHS materials purchased by the Tribe with IHS funds. IHS will return unused IHS funds to bulk accounts at the Area office for commitment to other projects, as appropriate.

(h) MOA Disputes: Any disputes among the parties to an MOA regarding its provisions or the fulfillment of responsibilities under the MOA are expected to be resolved by the parties at the Area level. Areas should have policies and mechanisms in place for settling disputes. There are a number of options for alternative dispute resolution such as mediation and dispute review boards. If a dispute cannot be resolved at the Area level, then any party to the MOA can request a review by the Director, OEHE, IHS Headquarters. To conduct this review, the Director, OEHE, will appoint a Review Board comprised of:

- (1) Director, OEHE, IHS, Headquarters;
- (2) An Area Director from an Area not involved in the dispute;
- (3) A Director, SFC Program, from an Area not involved in the dispute;
- (4) Other experts that may be deemed appropriate, such as a representative from the Office of General Counsel (OGC), or the HHS Office of Grants and Acquisition Management.

The Review Board will conduct an inquiry into the dispute. The Board will invite each party to the dispute to submit relevant information supporting its position. The Board may conduct a portion of its inquiry onsite, as appropriate. Such inquiry and any deliberation necessary shall be completed within a maximum of 60 days after receipt by the Director, OEHE, of the request for review.

Upon completion of its inquiry and deliberation, the Review Board will issue its decision to resolve the dispute, along with the complete factual information record compiled on the dispute. The Review Board's decision will be binding on IHS and may not be appealed by the IHS Area involved.

The Tribe or third-party may appeal the decision to the Director, IHS. If such appeal is made, the Director, IHS, will render a final decision for the Agency within 60 days of receipt of the appeal. The complete informational record compiled by the Review Board will be the only factual information about the case considered by the Director, IHS, in evaluating the merits of the appeal.

(i) MOA Completion: The project is completed when all the MOA provisions are met, which may be some time after the scope of work (e.g., construction) is completed. Some MOA provisions which refer to all or part of the constructed sanitation facilities that are transferred to the Tribe or that are vested in the Tribe may continue to apply indefinitely; e.g., O&M responsibility. IHS will return unused IHS funds to bulk accounts at the Area office for commitment to other projects, as appropriate.

CHAPTER IV. MOA Administrative Requirements For IHS

Sec. 1. Accountability: IHS employees are responsible and accountable for the management and monitoring of Federal funds and other Federal resources. The Federal interest in a project is best served when adequate internal controls are instituted and the roles of all the Federal participants are well defined. IHS employees in responsible positions (e.g., inspectors, project engineers) must know the applicable Federal resource management requirements and must provide the necessary documentation for expending those resources. Financial transactions must comply with applicable procurement and acquisition requirements including:

- Approvals of resource commitment and expenditure obtained from the appropriate person;
- Timely and accurate filing of project reports;
- The project must comply with applicable laws and regulations;
- Project resources must be used efficiently; and
- The project objectives should be achieved effectively.

Sec. 2. Internal IHS Controls: Internal controls are methods and measures used to insure accountability, as described above. Certain basic standards must be followed:

(a) Standards of Internal Control:

- (1) Documentation: All resource transactions must be clearly documented including fund transfers and contributions from Federal and non-Federal entities, equipment purchases, contracts, and payments. The documentation must be readily available.
- (2) Recording and Execution of Transactions: Resource transactions must be recorded when executed by persons acting within the scope of their authority.
- (3) Separation of Duties: To minimize the risk of loss to the government, key duties must be assigned to separate individuals including authorizing, approving, and recording resource transactions; issuing or receiving assets; making payments, and reviewing/auditing transactions or programs. These duties are outlined in more detail in Section 3.
- (4) Supervision: Qualified and continuous supervision must be provided to assure approved procedures are followed. Lines of personal responsibility and accountability within each Area must be clear.

(b) Review Procedures: Review and approval procedures to control the expenditure of Federal resources must be established. The authority for the MOA comes from P.L. 86-121. The administrative controls on the use of the MOA were refined and strengthened since 1959 by issuance of program administration guidelines and periodic internal program management reviews. The MOA is not a field level agreement that is executed by project engineers. The MOA and MOA contribution must be reviewed and approved at the Area level by senior SFC Program managers and approved by the Area Director. The approval process provides a check and balance system and eliminates the potential for conflict of interest. The approval process is dependent on the roles of various Federal employees involved in an SFC project. Those roles are discussed in Section 3 in general terms; some specific roles are described throughout the rest of the document.

(c) Prohibited Practices: With the exception of those on an IPA or MOA detail to a tribe, IHS employees are prohibited from making financial or other obligations on behalf of a tribe (or other MOA party), including issuing directives to the Tribe's employees or Tribe's contractors. Verbal and written contact between IHS employees and a tribe's contractors shall be prefaced with the statement that, "IHS is providing technical assistance only and is not an agent of the Tribe."

- (1) IHS employees are prohibited from signing (or co-signing) any tribal checks or having signatory authority on bank accounts, or signing contract documents including purchase orders, requests for quotation (RFQ's), etc.
- (2) Checks, either from the Government or the Tribe, shall not include a Federal employee's name.
- (3) Federal government letterhead paper and envelopes may not be used by a Tribe or Federal employees on behalf of a Tribe.
- (4) Original tribal contract documents, including bids, shall be kept and processed at tribal offices, not at IHS offices.

In order to maintain internal checks at all times, Area SFC Program Directors and OEHE Directors, acting in their respective capacities, may not sign MOAs or provide final Area approval for fund obligations. Only the IHS Area Director has that authority.

Sec. 3. Roles of IHS Personnel: The major roles of IHS personnel are described below. These roles are not all inclusive, because additional specific duties may be required depending on the method used to accomplish the work. For example, SFC personnel may have additional roles if the method of work is tribal procurement (see Chapter VI). In addition, other Federal responsibilities may be described in regulations governing personnel, contracting, property, and other matters.

(a) **Role of the IHS Project Engineer:** The IHS project engineer is the first level of responsibility for the project. Activities of the project engineer typically involve project planning, design, and construction management. However, within the context of the MOA, the project engineer has another important function, that of the "project manager." Depending on the specific method chosen to perform the work under the MOA arrangement, the project engineer may have other additional functions such as being the Federal Contracting Officer's Representative where the facilities are provided by IHS. The primary responsibilities of the project engineer with respect to MOAs, in addition to his/her technical role, include:

- (1) The project engineer is the official point of contact for routine matters and correspondence among all the MOA parties. The project engineer is responsible for coordination with all MOA parties and with other Federal officials.
- (2) Upon request and as appropriate, the project engineer will:
 - (A) Provide technical assistance in the development of Project Proposals;
 - (B) Provide explanations of programmatic requirements, regulations, guidelines, and funding criteria;
 - (C) Provide direct consultation and assistance to MOA parties concerning programmatic or technical matters.
- (3) Depending upon the availability of resources and as necessary, the project engineer will visit the project site to substantiate progress and compliance with MOA provisions, fund control/expenditure requirements, and all other applicable laws, regulations, and policies.
- (4) The project engineer will identify potential or existing problems and share with the appropriate staff information and/or findings concerning those problems. As appropriate, the project engineer participates with other staff to resolve those problems.
- (5) The project engineer is responsible for maintaining field level documentation pertinent to the MOA.
- (6) Project engineers will not make final decisions on funding issues (except for SF-44s or IMPAC cards), but will provide advice and recommendations to supervisors in a timely fashion. The project engineer has the responsibility to exercise judgment and prudent stewardship over Federal funds in accordance with the highest standards of professional and ethical conduct.

- (7) Project engineers are responsible for monitoring expenditures and construction progress and reporting this information to the District Engineer on a routine basis.

When an engineer is assigned to a tribal program under a P.L. 93-638 contract, the project engineer responsibilities described above are split between the tribal engineer and the IHS District Engineer or other designated IHS employee. The relationship is one of shared project responsibility between the tribe and the Federal government. The tribe's project engineer will perform the traditional project engineer functions having to do with project development, execution, and completion. However, the government responsibilities for assurance of the technical and administrative aspects of the project, in deciding compliance with the MOA provisions, fund release approvals, etc., shall be retained by the IHS District Engineer or other designated IHS employee.

(b) Role of the District Engineer: A primary role of the District Engineer is the supervision of the project engineers. In that role, the District Engineer is responsible for insuring that the project engineer is carrying out all of his responsibilities as project manager. Additionally, the District Engineer has the following MOA related responsibilities:

- (1) Provide information, especially regarding fund obligations, and recommendations to the SFC Program Director and other Area office officials.
- (2) Ensure that the provisions of the MOA are carried out.
- (3) Recommend approval or disapproval to the SFC Program Director for all MOA contribution payments.
- (4) Notify the Area Office that construction progress and expenditures are as projected, or advise the Area if otherwise.

When tribes have contracted for environmental health program positions under P.L. 93-638, the project engineer responsibilities are shared between the tribe's engineer and IHS personnel as described above in (a). The District Engineer may be assigned collateral duties as the government's representative on sanitation facilities projects funded under P.L. 86-121. Those duties include assuring technical adequacy of the facilities installed, reviewing management of the project funds, certifying fund releases, providing final government approval of completed facilities, closing out the project, and other non-contractible portions of the program.

(c) Role of the IHS Area SFC Program Director: The SFC Program Director is responsible for establishing Area specific MOA policies (consistent with this document) and related internal controls, for negotiating agreements among the MOA parties, and for reviewing the language of the MOA provisions. The SFC Program Director makes recommendations for project funding to the Area Director through the OEHE Director. The SFC Program Director does not have the authority to execute an MOA, but ensures that the terms of the MOA are carried out. The SFC Program Director has the following additional MOA related responsibilities:

- (1) Makes recommendations to the OEHE Director and the Area Director regarding MOA approvals, MOA amendments, transfer agreements, and notices of completion, suspension, or termination of MOAs.
- (2) Provides review and programmatic approval of all IHS MOA fund contributions consistent with the MOA and all internal controls.
- (3) Insures that MOA and contract responsibilities and conditions are authorized by Federal laws and regulations and IHS authorities.
- (4) Reviews tribal unit prices and tribal procurement payments.
- (5) Insures that the method(s) of accomplishing the work are appropriate and in accordance with applicable laws, regulations, and policies.

- (6) Reviews the tribal capacity to administer the project as outlined in the MOA.
- (7) Insures that MOA time constraints and cash flow schedules are met and that IHS responsibilities and obligations are carried out in a timely manner; e.g., fund transfers and payments.
- (8) Insures that proper documentation is in the official project files and that other internal control procedures are being followed.
- (9) If appropriate, initiates a final project audit for all projects exceeding \$25,000 and ensures the project is closed out.
- (10) Conducts annual Service Unit or District level reviews of field activities to insure proper implementation of the MOA.
- (11) Assists the Headquarters IHS in periodic Area reviews which include review of MOA practices.
- (12) Maintains familiarity with these MOA guidelines and related policies, including OMB Circular A-87, and other documents applicable to the MOA.

(d) Role of the Director, OEHE: The Director, OEHE, at the Area shall review and recommend that the Area Director approve internal controls for MOA approvals and MOA resource transactions in the Area SFC Program. Subsequently, the OEHE Director is responsible for ensuring that those controls are followed. The OEHE Director shall be considered the external check for the SFC Program.

(e) Role of the Area Director: The Area Director is delegated the authority from the Director, IHS, to enter into MOAs. The Area Director relies on the Area OEHE program officers and the Area financial management staff for funds accountability. As authorized by P.L. 86-121, the MOA is used by Area finance officers as documentary evidence for obligating funds for sanitation facilities project construction. The Area Director and the Area finance office provide a check that is external to the SFC Program. The Area Director approves, monitors, and enforces the SFC Program guidance with respect to MOA approvals and internal fund controls.

(f) Role of the Headquarters SFC Program: The SFC Program at the IHS Headquarters (HQ) level establishes national MOA policies and guidelines that are consistent with OMB, HHS, and IHS regulations and is responsible for ensuring those policies and guidelines are carried out consistently among all IHS Area SFC Programs. This is accomplished by periodic reviews of all Area practices and Area-specific internal control guidelines and by a periodic review of MOA's for the inclusion of required provisions. The HQ SFC Program is responsible for implementing the basic internal control framework for the SFC Program, which is the basis for Area internal controls and includes these guidelines.

Sec. 4. Ethical Standards: When assisting the tribe or other MOA party to construct or procure facilities or services under an MOA, IHS employees shall observe all ethical and legal standards required of them as Federal employees. If they observe any practices by the tribe, its contractors, a third-party, or another Federal employee that appear to fall below those standards, they shall report their observations immediately to the IHS Area SFC Program Director for appropriate action.

CHAPTER V. Direct Provision By IHS

This chapter discusses construction of sanitation facilities using a Federal government contract or using IHS employed construction workers. The contractor in a Federal contract may be the Tribe that signed the MOA and making it appear that the Tribe is providing the facilities; however, that is not the case. When the Tribe contracts with the Federal government directly or after the MOA is signed by all parties, the Tribe is a Federal contractor providing the facilities for the government. Facilities constructed by the Tribe for IHS under a Federal contract must be transferred to the Tribe or other entity to own, operate, and maintain.

A Title I construction contract is a Federal contract; however, under a Title I construction contract, the tribe owns the constructed facility unless it requested otherwise. If the funds were contributed to the Tribe through an MOA and the Tribe provides the sanitation facilities, the owner of the facilities could be the Tribe or another MOA party that would own, operate, and maintain the new facilities.

An MOA for construction of sanitation facilities using IHS employed construction workers or force account has most of the MOA provisions listed in Chapter III including:

- Tribal Labor and Administrative Supervision;
- Labor;
- Construction Safety and Liability;
- Construction Account;
- IHS Contributions and Obligations.

Sec. 1. Government Contracting: A contract is a legal document which has several functions including communicating to the Contractor what the other parties to the contract want to build, where to build, what type of materials to use, and when the facility is to be completed. The rules for contract administration are in the FAR system supplemented with Buy-Indian Act and 638 Title I contracting regulations. All contract administration is done with the assistance of a contract specialist, project officer, and when applicable, Contracting Officer. Additional information on contract administration may be found in the FAR System.

There are several laws regulating wages and hours of workers employed on Federal contracts for public works or construction.

- The "standard workweek laws" limit the employment of laborers and mechanics on such projects to 40 hours per week and permit their employment in excess of that limit only upon condition that compensation at a rate not less than one and one-half times the basic-wage rate is paid for the excess hours (40 U.S.C. Sec. 328).
- The Davis-Bacon Act (40 U.S.C. 276a to 276a-5) provides that the minimum rates of pay for laborers and mechanics on certain Federal public-works contracts shall be those prevailing for the corresponding classes of workers in the locality as determined by the Secretary of Labor.
- The Copeland Anti-Kickback Act (40 U.S.C. 276c; 18 U.S.C. 874) prohibits the exaction of rebates or kick-backs from workers employed on the construction of Federal public works or works financed by the Federal Government and authorizes the Secretary of Labor to make regulations for contractors engaged on such projects.

In addition to the above statutes, there are several acts which require the payment of prevailing-wage rates, as determined by the Secretary of Labor, to laborers and mechanics employed on construction financed in whole or in part by loans or grants from the Federal Government or by mortgages guaranteed by the Federal Government. Those acts include

the National Housing Act, the Housing Act of 1949, the Federal Airport Act, and the Hospital Survey and Construction Act of 1946.

(a) Open market contracts: When the Federal government acquires goods or services that are not available from mandatory sources, they are procured on the "open market." Acquisitions from the open market sources generally are fully competitive but can be restricted to a class of contractor, such as Indian contractors (Buy-Indian) or small business enterprises. Justification is required for a sole-source contract; a "Justification for Non-competitive Acquisition" shall be prepared. For unrestricted contracts, bidders can be non-Indians, Indian-owned firms, tribes, tribal-owned entities, or any other combination of private enterprises or entities.

The Buy Indian Act (25 U.S.C. Section 47) is a "set-aside" authority, which exempts Buy Indian set-asides from competition requirements. Current regulations applicable to acquisitions by the IHS under the Buy Indian Act are at 48 CFR Subpart 370.5¹¹. The Buy Indian Act (and other statutes) is applicable to the IHS because of the Transfer Act (42 U.S.C. Section 2001). Under the PHS Buy Indian regulations at 48 CFR Subpart 370.5, set-aside acquisitions are negotiated acquisitions but should be conducted as if they were formally advertised acquisitions where appropriate.

A contract may be awarded under the Buy Indian Act only if it is determined by the Contracting Officer that the contracted project is likely to be performed satisfactorily and is likely to be properly completed and maintained. If an Indian firm is awarded a Buy-Indian contract, it must conform to the same requirements as other non-Indian contractors with some exceptions. Those requirements include:

- (1) Preference in awarding contracts (via an Indian set-aside) is given to Indian firms, which are defined as a sole proprietorship, partnership, corporation, or other type of business organization owned, controlled, and operated by one or more Indians; or a non-profit firm organized for the benefit of Indians and controlled by Indians.
- (2) The degree of Indian ownership of an Indian firms shall be at least 51 percent during the period covered by a Buy Indian contract. [40 CFR 370.503(a)]
- (3) An Indian firm may enter into a joint venture for a specific contract as long as the Indian firm is the managing partner, and the joint venture is approved by the Contracting Officer prior to award of a contract.
- (4) Bid, performance, and payment bonds are required of contractors except an Indian tribe or public non-profit organization serving as governmental instrumentalities of an Indian tribe doing work on reservation land held in trust for that tribe. However, wholly separable, tribally owned business enterprises are required to be bonded.
- (5) Under a prime contract awarded under the Buy-Indian Act, not more than 50 percent of the work to be performed may be subcontracted to non-Indian firms; i.e., at least 50 percent of the work must be performed by Indian firms or Indian subcontractors. [48 CFR Subpart 370.503(e)] For this purpose, work does not include procuring or providing materials, supplies, or equipment.

¹¹Title 48--Federal Acquisition Regulations System; Chapter 3--Department of Health and Human Services; Subchapter T--HHS Supplementations; Part 370--Special Programs Affecting Acquisition; Subpart 370.5--Acquisitions Under the Buy Indian Act.

(6) All contracts over \$2,000 require Davis-Bacon wage rates except for contracts with tribal governments, where tribal government workers will perform the construction. [48 CFR 370.503(f)].

(7) Buy-Indian contracts are subject to the requirements of Section 7(b) of P.L. 93-638, which requires that preference be given to Indians in employment, training, and subcontracting.

(8) Contracts to be awarded under the Buy Indian Act are subject to competition among Indians or Indian concerns to the maximum extent that competition is determined by the Contracting Officer to be practicable, pursuant to the FAR. When competition is not practicable, a "Justification for Non-competitive Acquisition" shall be prepared and approved by the Senior Contracting Officer for contracts up to \$100,000 or, if over that amount, approved by IHS Headquarters Finance. Solicitations must be publicized in the Commerce Business Daily in accordance with the Competition in Contracting Act (CICA; 41 U.S.C. Section 253(a)(1)) and copies sent to the applicable tribe.

(b) 638 contracts: Tribes may elect to provide sanitation facilities under Title I of P.L. 93-638, as amended or, as it is commonly known, a "638 contract." Regulations for 638 construction contracts are found at 25 CFR 900, Subpart J, Sec. 900.110 et seq. The 638 contracts used in the SFC Program are generally of two types:

(1) A 638 administration contract is used for activities related to construction program administration and management.

(2) A 638 construction contract is a fixed-price or cost-reimbursement self-determination contract for a construction **project** [25 CFR Sec. 900.113(a)]. A construction contract may include planning services and construction management services.

These Self-Determination 638 construction contracts are not traditional "procurement" contracts. As authorized by P.L. 93-638, the FAR regulations apply only to the extent that they are necessary to insure that the contract is carried out in a satisfactory manner and are directly related to the construction activity (25 U.S.C. Section 450j).

Upon receiving an indication that a tribe is interested in pursuing either type of 638 contract, IHS personnel shall advise the Tribe to make their request known in writing to the Area Director, and the Area SFC Program Director shall be notified immediately. If a tribe or tribal consortium obtains a 638 contract which includes the local administration of the Sanitation Facilities Construction Program, an MOA may be used between the IHS and the tribe to obligate funds to a sanitation facilities construction project.

Funds that another agency has already awarded or allocated to tribes, but then passed to IHS to give to the tribe are not considered to be "administered by the Secretary" and may not be included in a 638 contract. If IHS accepts this type of contribution, which is not administered by the Secretary, then the MOA is the only instrument that may be used to transfer funds to the Tribe. [see Chapter I, Section 4(c)]

(c) 638 Title V: Participating Self-Governance Tribes may agree to undertake construction projects under section 509 of P.L. 93-638, as amended; the implementing regulations are at 42 CFR Part 137, Subpart N-Construction, Section 137.270 et seq. Construction projects are separately defined in Title V and are subject to a separate proposal and review process. Self-Governance Tribes may enter into and administer self-governance construction project agreements for construction projects.

Self-Governance Tribes performing construction under section 509 are required to assume the IHS Federal responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), the National Historic Preservation Act (NHPA), and related environmental laws. Self-Governance Tribes who undertake construction projects under Section 509 have the responsibility to complete construction project agreements and provide day-to-day management and administration for construction projects, within available funding.

Self-Governance Tribes also have the option of performing IHS construction projects under other legal authorities including Title I of P.L. 93-638, as amended, the Indian Health Care Improvement Act (P.L. 94-437), and P.L. 86-121.

Sec. 2. Government Force Account: During the project planning phase, it may be determined by the tribe and IHS that all or part of the proposed cooperative project should be built by government force account method [see also Chapter II, Section 1(a)]. Under the government force account method, the IHS oversees the execution of the project, schedules and directs the day-to-day operations at the job site through a project manager or foreman, and controls project expenditures. The materials used on the project may be purchased either by the Tribe in accordance with Chapter VI (Section 2, Tribal Procurement) of these guidelines, or by the IHS in accordance with the FAR. The workers on the project could be Federal employees, tribal employees, or a mix of workers. The IHS could procure materials, furnish construction equipment, arrange transportation, schedule work, and assure quality control for all or part of the project. The Tribe could provide skilled or unskilled workers paid with MOA contributed funds to work along with Federal employees on the project.

(a) **Background:** The government force account method, with some labor provided by the Indian Tribes, was the predominant method of accomplishing the work during the first 10 years of the program. In recent years as tribes developed more capability to manage their own projects, other methods of constructing sanitation facilities were created. Nevertheless, the intent remains that both the Federal government and the tribes will continue to work together to improve the health of the American Indian and Alaska Native people.

(b) **Government Force Account Policies:** Policies governing government employees doing construction work are established by the Office of Personnel Management and are not described in this Guideline; consult the Area personnel office for applicable policies. If the parties to the MOA choose to proceed with a project in the manner described above (government and tribal employees working together at a job site) as Government Force Account, the MOA parties need to understand the roles and limits of supervision. These roles must be understood by the parties and documented in the MOA.

(1) **Roles and Limits of Employee Supervision:** Employee supervision is a broad activity consisting of several significant authorities and responsibilities towards employees including hiring, directing, assigning, promoting, rewarding, suspending, disciplining, and removing employees. In the cooperative relationship established under the MOA to construct a sanitation project using a government foreman and local tribal employees, the authorities and responsibilities are shared between the two parties.

The role of the foreman is to be responsible for the technical direction of the local project workers in assigning, directing, and reviewing work and reporting on performance on a routine basis. If a problem develops regarding performance, attendance, or conduct on the project, the Foreman will convey this information to the tribal project administrator for appropriate action. The workers are generally residents in the community, who are hired as short term employees for the duration

of the construction project. The working relationship between the Foreman and tribal workers provides a way to train the tribal workers on proper construction techniques while insuring quality construction. Often, the project workers are employed later by the local government for future O&M activities. The knowledge gained during construction is valuable in insuring proper system O&M.

The role of the tribal project administrator is to be responsible for all other aspects of employing local project workers. These functions include hiring, evaluation of performance, suspending, rewarding, promoting, disciplining, and removing employees. Local workers must be hired in accordance with prevailing local, state, and federal labor laws and regulations and sound business practices. This requires processing all necessary paperwork with special emphasis on workman's compensation insurance, tax documents, time records, pay schedules, and payroll processing records. If assistance is needed in guiding the local government, professional services are suggested to accomplish the required tasks. This assistance usually is an allowable project cost.

The project wages for local workers are set by mutual agreement between the local government and the IHS. Federal wage requirements do not apply to local governments performing force account work, because they are in a position similar to municipal, state, or Federal employers for whom the Federal requirements do not apply. The waiver does not apply if the contractor is a private business corporation, whether or not owned by the Tribe or members of the Tribe or is an individual Indian contractor.

A list of needed technical skills, number of workers, and work schedules is developed during the project planning process by the project engineer, project foreman, and local officials including the tribal project administrator who will handle local worker hiring and administration. Using this planning data, the required number of workers are hired by the local government from available residents. If additional workers are needed or existing workers need to be released for poor performance, the project foreman communicates these needs to the appropriate tribal official, and the required actions are handled by the local government.

The cost of the Tribe's administrative supervision of its employees is an allowable project cost. This fee will be set after an evaluation of the extent of the tribal services to be provided.

(2) Liability and construction safety are other considerations and are discussed briefly in the following Chapters as they apply to direct provision by tribes and by third-parties. A more detailed discussion is found in Chapter 11 of the Criteria document.

CHAPTER VI. Direct Provision By Tribes

This chapter discusses the MOA method used to contribute funds to a tribe or tribal organization, when the Tribe or tribal organization provides the sanitation facilities and services. The Tribe may provide the sanitation facilities either (1) by tribal force account or (2) by tribal procurement. This chapter does not apply when tribes contract with IHS to provide sanitation facilities, after the MOA is signed (see Chapter V).

In addition to the Chapter III provisions, the MOA for accomplishing the work includes:

Tribal Procurement: (see also Appendix A).

- Tribal Contributions Section
- IHS Contributions and Role Section
- Procurement Standards
- Competitive Procurement Practices
- Indian Preference
- Required Notice to Prospective Bidders
- Wage Rates
- Bond Requirements
- Subcontract Limits
- Administrative Provisions
- General Provisions
- Special Provisions
- Submittal Requirements
- Final Inspection

Tribal Force Account: (see also Appendix A).

- General Provisions
- Abbreviated Cost Control Provision or Comprehensive Cost Control Provisions

Sec. 1. Tribal Force Account: This section discusses projects in which all or some funds are contributed to a tribe to provide sanitation facilities through tribal force account. Tribal force account normally refers to the method of construction where the tribe has control of construction and uses tribal employees to do construction work. Typically, construction management is coordinated with IHS, but remains a responsibility of the Tribe. For projects using tribal employees, but under the technical supervision of the IHS, refer to Chapter V, Section 2, Government Force Account Work. The requirements and roles of the Tribe, IHS field staff, and others under tribal force account are described in this section. The Tribe may have to procure materials and possibly specialized technical services, unless the materials and technical services are provided by IHS. Tribal procurement is discussed in Section 2 of this chapter.

The Tribe and IHS shall comply with all the provisions of subsections (a) through (f), below, for all projects in which the Tribe performs some of the work or constructs facilities using tribal force account, including determining tribal administrative capability, arranging for construction management by the Tribe, project planning, technical review, and cost estimating.

(a) Construction Management and Supervision: In the usual MOA relationship, the Tribe and the IHS agree to work together to accomplish a common goal, the construction of sanitation facilities. If the Tribe is constructing the sanitation facilities by force account, the Tribe is responsible for providing qualified construction supervision. Since IHS and the Tribe work cooperatively to accomplish the project construction, IHS must insure that the construction management and supervision provided by the Tribe is adequate. If the Tribe does not have a person with technical

expertise to supervise job site construction, an alternative is for the Tribe to contract with or hire someone with the expertise. Also, if agreed, the project construction may be guided at the site by an IHS employee working with and training a tribal construction supervisor. However, if an IHS employee effectively is the construction supervisor, this is considered to be Government Force Account work, and the principles in Chapter V must be implemented.

(1) Risk Sharing: The parties to the MOA share in some risk as in most cooperative relationships. Since funds for projects are limited, one risk is that the project cost may exceed available project funds and some or all of the proposed sanitation facilities may not be provided. The amount of financial risk (other than tort claims) assumed by each MOA party is proportional to the amount of funds contributed by that party. Each MOA party is responsible for resolving any tort claims against it. When cost overruns are discovered only at the end of the construction period, the Tribe assumes a risk that it will not be reimbursed by IHS because of lack of funds. Similarly, the IHS could determine that certain expenditures are not allowable under OMB Circular A-87 and not reimburse the Tribe. For tribal force account, profit is not allowed as it would be under a typical construction contract. Profit was defined in Chapter II.

(2) Tribal Administrative Capability: If the Tribe is to perform the work by force account, it must meet minimal standards for financial management, procurement management, and technical management to demonstrate its administrative capability. The extent of the controls and capabilities required will depend on the size, complexity, and duration of the project.

(A) Financial Management: The Tribe must have procedures and policies for payroll, accounting, budget control, and record keeping commensurate with the project scope, as described in Section 3. If the Tribe does not have staff to provide financial control, it must retain a Certified Public Accountant (CPA) or other similarly qualified individual for the project who can meet those requirements.

(B) Procurement Management: If the Tribe is to procure materials, it must have an acceptable contract administration system commensurate with the project scope, as described in Section 3. If the Tribe does not have the contract administration capability, it must obtain that function by retaining a CPA or another qualified agent, or it must obtain procurement services through another non-Federal MOA party.

(C) Technical Management: Because the Tribe has control over construction at the project site, the tribal employee in charge must have demonstrated experience in supervising similar types of construction successfully. The selection of and change of the onsite construction project manager is subject to the approval of the IHS.

(3) Limits to IHS Onsite Project Authority: When the work is performed by tribal employees under the direction of a tribal construction supervisor, the responsibility of IHS personnel at the job-site are generally limited to quality assurance and technical assistance. IHS staff may not function as supervisors of tribal force account workers.

The Tribe is responsible for providing the tribal construction supervisor and the tribal employees with the necessary skills for the job and that are mutually acceptable to the Tribe and IHS. IHS is responsible for assuring that the facilities are constructed by the Tribe in accordance with the plans, specifications, and the MOA. IHS oversight of quality assurance at the job site may require providing

some technical assistance to the tribal construction supervisor for solving problems in a cooperative manner (also see (e) below). If an IHS employee observes a problem with productivity or quality control at the job site, the IHS employee will advise the tribal construction supervisor or others, as appropriate, and work with the supervisor to resolve the problem. An IHS employee may provide technical assistance to tribal construction supervisors on skills improvement or construction techniques; however, this is not to be construed as supervision.

(b) Project Planning and Cost Estimating: Preconstruction planning is a vital part of force account construction. Although the Project Summary is part of the MOA and contains the preliminary cost estimate by IHS for the total cost of the project, the tribe that will be using force account construction methods must plan for how it will accomplish the work and develop its own cost estimate for the work. This step is necessary for the tribe to insure that it has the ability to perform the work cost-effectively and within the total project budget. If it cannot do the work cost-effectively with its own employees, then the tribe may contract with someone else to construct the facilities or request IHS to construct them.

(1) Technical Review: The IHS will work with the tribe to analyze detailed project plans to determine the proper use of labor, equipment, materials and services to complete the project tasks. This type of planning is necessary (1) to provide clarification of project design and identify incomplete plans, (2) to establish equipment needs, (3) to estimate project administrative support costs, (4) to anticipate payroll, insurance, and other cash flow needs during construction, and (5) to provide a basis for a cost control system for comparison of actual and anticipated costs during construction.

(2) Cost Estimating Basis: All tribally administered projects must use the Cost Principles established in OMB Circular A-87 (see Appendix D), which specifies the allowable project costs. Tribal cost estimates for allowable force account costs are divided into labor costs, equipment costs, material purchases (procurement), service contracts, and project administrative support costs. When those tribal cost estimates are converted to unit costs, they can be compared to unit costs for similar work performed on previous contract jobs. This comparison is helpful in supporting an IHS determination that tribal force account is a viable method of constructing sanitation facilities projects. Unit costs should not be used to "bid" on work under tribal force account; the unit cost must be adjusted for the specific project under construction.

(A) Labor Costs: Labor cost is a major component of construction. A careful review of the scope of a project will help the Tribe to estimate the anticipated labor needs and required skill levels. Meticulous project planning by the Tribe can establish the method of hiring, the definition of duties, the method to evaluate labor efficiencies, and the procedure for dismissal of unneeded or ineffective workers.

The wage rates for all workers, who are employees of the tribal group being served, will be based on the local wage rates for similar work as established by the Tribe and IHS. Under these conditions, the Federal Davis-Bacon wage rates do not apply as they would if the tribe engages a contractor to provide the facilities. The relationship between the funding source, method of construction, employer, and required wage rates shall be carefully reviewed during the project planning to make sure the proper rates apply. For force account construction, "time cards" and required review/certification of time cards are important for proper record keeping and project audits.

The tribe may pay its employees an incentive fee based on performance and/or cost containment provided that the tribe has a formally adopted incentive program established before the project award and approved by IHS. Incentive pay is an allowable cost under OMB Circular A-87. The pay must be reasonable as compared to similar work in the vicinity, and total wages plus incentive pay must not exceed prevailing wage rates.

(B) Equipment Costs: Another major construction cost is equipment, which may be owned by the tribe, the IHS, or a third-party. Proper project planning involves matching the project needs with the available equipment. The cost of equipment should be allocated at a rate which pays for ownership, maintenance, repair, fuel, oil, and depreciation. Other factors affecting cost, such as transportation, age, overhead, storage, use conditions, and disposal should be reviewed in establishing an equitable rate for each item used. There are standard construction industry reference manuals that provide assistance in establishing rates; e.g., R.S. Means Company Inc., which publishes construction cost information on several sectors of the construction industry. If a certain piece of equipment needs a major overhaul before it can be used, an equitable method of allocating the appropriate share of this cost to the project shall be determined. If a piece of equipment is to be used without charge or as part of an in-kind contribution, the terms of the use agreement should be documented to avoid later disputes. It is important to develop a method to document the use of each piece of equipment. This document should state the time allocated to the project and be certified by the IHS onsite representative. Failure to follow this policy can result in disputes and lack of data for audits.

Costs for equipment rented from independent contractors for tribal use may be allowable to the extent that the rates are reasonable after considering factors including rental costs of comparable equipment, market conditions in the vicinity, alternatives available, or the type, life expectancy, condition, and value of the property.

Policies and procedures regarding equipment rates, minimal usage periods, downtime, equipment reserve accounts, and equipment transportation are to be developed by each Area in accordance with applicable cost principles.

(C) Materials and Services Costs: Materials and services may constitute another major component of construction costs. Procurement of materials and services are discussed in Section 2 of this chapter.

(D) Indirect Costs and Project Administrative Support Fees: Indirect costs and project administrative support fees are discussed in Section 3 of this chapter.

(c) Insurance and Liability for Damage: For tribal force account work, the Tribe must obtain and maintain current insurance policies throughout the project construction including, (1) general public liability and property damage, and (2) workman's compensation coverage in accordance with applicable requirements. The Tribe and its insurance carrier are liable for damages or injuries to third-parties or tribal workers.

(d) Construction Safety: Safety at the tribal force account project site is the responsibility of the tribal construction supervisor. The tribal construction supervisor is responsible for complying with all applicable construction safety regulations. This should be explicitly stated in the MOA and in subsequent project documents. The onsite authorities and responsibilities shall be discussed during the project planning

phase and well defined in the MOA. The IHS may review tribal construction safety measures and advise the tribe of any significant safety issues, in order that the Tribe may take appropriate action. However, such advice will not relieve the Tribe of its liability if accidents occur.

(e) Construction Inspection: The MOA must clearly identify the IHS role in construction inspection and require that tribal procurement documents also include the right of IHS employees to inspect the work. References to IHS rights and responsibilities should not identify specific individuals by either job title or name. IHS is responsible for necessary project construction inspection for all force account work unless specific agreements to delegate or contract this responsibility are made. This responsibility includes assurance of compliance with plans, specifications and applicable shop drawings, materials approval, testing verification, and final acceptance. IHS employees can inspect the construction and advise the tribe and/or the tribal contractor whether the construction meets the design intent and minimum applicable standards. However, all direction to the contractor must come from the Tribe. If daily inspection responsibility is delegated, the IHS shall remain in an oversight role to resolve major problem situations.

(f) Warranties: Warranties of one-year duration should be obtained from vendors on all purchased equipment, materials, and supplies. For tribal force account work, the IHS and other project participants (funding or in-kind contributors) warrant workmanship in proportion to their original contribution or for the work for which they were responsible (subject to availability of funds) unless the tribe agrees to warrant the work in the MOA or other arrangements are made. The warranty period for workmanship shall be for a period of one year from the date of transfer or one year from the date on which the tribe obtains beneficial use of the facilities, whichever occurs first.

(g) Cost Control: In addition to (a) through (f) above, cost control is an important part of the tribal force account method of providing sanitation facilities. Significant increases in actual costs over estimated costs could force a major reduction in the scope of facilities provided or place tribal and IHS resources at undue risk. The Tribe and IHS must adopt procedures that provide adequate protection to both parties without creating high costs or undue burden for either party. A properly used cost control system provides the greatest protection to the Tribe. Before receiving its final contribution from IHS for facilities constructed or services provided, the Tribe must certify that the total fund contributions they received from IHS were expended for allowable costs as prescribed by OMB Circular A-87 and that the Tribe did not make a profit.

(1) Abbreviated Cost Control System: The Abbreviated Cost Control System is for tribal force account projects where the estimated total cost of construction in the Project Summary is less than the cost control ceiling set by the IHS Area SFC Program. That ceiling may be set by the Area based on local practice and experience up to a maximum of \$400,000 (over 75 percent of sanitation facilities construction in PDS were at or below this value for FY1995 through FY2000). For force account work estimated to cost less than the ceiling established by the Area (Area ceiling not to exceed the upper limit stated above), the tribe may follow the procedures described in this section. This type of cost control system is used for small construction projects, when there would be no additional benefit to the government to require the comprehensive controls in paragraph (2). The abbreviated cost control system does not relieve the tribe from using sound project management practices.

(A) Requirements When Tribal Force Account Project Amount is Below Cost Ceiling: In addition to the requirements of subsections (a) through (f),

the Tribe will prepare a detailed cost estimate for the proposed work including the estimated amounts for labor, equipment, materials, and services. The total amount of those estimates may be converted to unit costs for the work to be performed. Those estimated unit costs are compared to unit costs for similar work completed previously by the Tribe or by contractors of the Tribe or of IHS. In making that comparison, the Tribe and IHS determine if tribal force account is a viable method to construct the proposed facilities.

When the determination is made to use the tribal force account method, the Tribe can propose those unit costs as anticipated allowable costs to construct facilities under the project. By carefully reviewing the unit costs with the Tribe in the planning stage, IHS can confirm that the unit costs are not expected to result in any measurable profit or loss and that the unit costs are reasonable and allowable. The unit costs are subject to the approval of the Area SFC Program Director.

Once the Tribe proposes the unit costs and IHS approves them, those costs will be the basis for contributions of federal project funds to the Tribe. Actual contributions from IHS will be determined by multiplying the number of units actually constructed by the approved unit costs, adjusted by the project administrative support fee established in accordance with Section 3(a)(5).

During project construction and execution, if the Tribe encounters conditions where the approved unit costs are not valid for some or all of the remaining work, the Tribe should contact IHS to discuss the possibility of revising the unit costs. Since the revised unit costs will apply to future work, the Tribe must notify IHS immediately upon discovery of the significant condition that justifies a change in unit costs. In such cases, IHS shall promptly evaluate the condition and determine what adjustment in unit cost, if any, is appropriate, subject to the approval of the SFC Program Director. Conditions that may require revising the unit costs include differing site conditions and changes in personnel, material, and equipment costs. Changes in unit costs may also require adjusting the scope of the project, which may require an amendment to the MOA.

Under this system, cost control is achieved by thorough analysis of project plans and specifications; planning, estimating, developing and comparing unit costs against other similar construction costs; and then applying the agreed upon unit costs as allowable costs.

(2) Comprehensive Cost Control System: A cost control system to track project costs and financial status during construction shall be agreed upon by the IHS and the Tribe before each project starts.

- The purpose of the cost control system is to prevent cost overruns.
- Cost control measures consist of project status reviews, record audits, and coordination of all project activities with the IHS contact designated in the MOA.

Once the project construction starts, the Tribe must maintain current cost records for use in comparing expenses with previously developed budget and cash flow estimates. When cost overruns are not discovered until the end of the construction period, the Tribe is at a risk that it will not be fully reimbursed from IHS, because its costs are considered unallowable or have exceeded the maximum funding amount specified in the MOA.

(A) Budget Development: With IHS assistance, the Tribe will develop a tribal project budget for force account work for each of the cost categories

described in Section 1(b)(2). This mutually agreed upon budget is a non-contractual agreement; therefore, fixed price bids are not allowed, because it may imply a contractual arrangement. The reasons for developing the budget are:

- To let all parties know the total amount of funds available for the designated portion of work to be accomplished by the tribe,
- To establish targets for reasonable costs for units of work to be performed,
- To develop a working capital advance, as necessary, and
- To establish a cash flow and reimbursement schedule.

Once established, this budget becomes the basis for controlling project costs during construction.

(B) Roles of Project Personnel in Cost Control: The Tribe and IHS must identify people who will perform various essential roles during the project for the purposes of keeping records and providing approvals.

- (i) Tribal Construction Supervisor: The tribal construction supervisor is the construction site manager for tribal force account. The tribal construction supervisor is responsible for supervising tribal employees, for tracking the project status, for equipment and personnel usage, and for insuring that the information is recorded on a routine basis (production reports, time cards, equipment time sheets). Adjustments to construction techniques, equipment utilization, and crew management required to improve efficiency are the tribal construction supervisor's responsibility.
- (ii) IHS Project Engineer: The IHS project engineer represents the Federal Government's interest in the cooperative project. The IHS project engineer, or his/her designated representative (inspector) is responsible for reviewing cost data for labor, equipment, and materials on a regular basis on behalf of the IHS. The IHS project engineer shall keep a log of all construction activities (through inspections, oversight visits, and communications) and insure receipt from the Tribe of all required reports. The IHS project engineer is responsible for comparing the work accomplished against the approved project budget and for certifying work accomplished and costs incurred.
- (iii) Project Office: The Tribe's project accounting office or its designated accounting firm is responsible for filing the time sheets, making the charges against the correct charge codes, and preparing the necessary reports for cost control reviews and requests for funds from IHS.

(C) Cost Control Review and Reporting Requirements: Prior to the start of construction, a project review and reporting schedule shall be established for each project. On a regular basis, the tribal project administrator or designated accounting firm shall provide to IHS an up-to-date accounting of all charges for labor, administrative support costs, equipment, materials, and procured services, and an up-to-date accounting of all cash flow transactions including payroll. These reports shall be prepared in an agreed format, so that they can be compared with the project budget and current project production status.

(D) Cost Overruns/Corrective Action: Prior to starting each project, the IHS and the Tribe will review the Area's policies and procedures regarding cost overruns or exceeding the project budget. Should the monitoring information

indicate that the project will exceed the budget or otherwise is in financial distress, the IHS project engineer shall first verify that the information is reasonably accurate and then shall notify the District Engineer. The Tribe is to be notified to make corrective actions for solutions to minor problems. This plan is to be documented and communicated to the District Engineer and Area SFC Program Director.

The SFC Program Director will initiate more extensive reviews for major cost overruns. The SFC Program Director will take appropriate action, involving the Area Director, if necessary. Appropriate actions may include (A) initiating major changes through the tribe in the utilization of labor, equipment, and materials to improve efficiency, (B) assistance in identifying additional funding, (C) changes to the payment methods, (D) revising the scope of work, (E) government takeover of the project subject to approval by the Area Director, and (F) suspending the project and/or terminating the project. The IHS project engineer shall followup to verify that the approved actions are taken and closely monitor the Tribe until such time as the problem is resolved.

Sec. 2. Tribal Procurement: This section covers projects in which the Tribe decides to provide the required sanitation facilities and services for its direct benefit using its own internal procurement system. IHS provides technical assistance and contributes funds to the Tribe for the approved cost of the sanitation facilities and services.

The IHS and the Tribe will decide mutually and spell out in the MOA whether construction (and design, as appropriate) is accomplished through tribal procurement. Factors relevant to such a decision include previous experience in doing tribal procurement, existence of an established procurement system, financial stability, and administrative capability.

The parties to an MOA are required to comply with administrative procurement standards stated in this section. Most of the common standards governing payments, allowable costs, changes, real property, equipment, competitive procurement, and records are discussed in these guidelines. Each Area must have a set of guidelines that explain the contract review procedures for project engineers who are responsible for tribal contract projects.

The SFC Program has assisted tribes in administrative capability building by allowing tribes to procure sanitation facilities construction themselves with substantial IHS SFC Program involvement, thereby promoting self-determination. An alternative to this method is the 638 Indian Self-Determination contract, which was described in Chapter 5, Section 1(b). The 638 construction contract is another method available to provide sanitation facilities which does not alter a tribe's option to procure materials and services with funds contributed under an MOA. The advantage of the MOA method is that it tends to be a faster process.

(a) **Procurement Standards:** The Tribe must use a system of contract administration that ensures performance by its contractors in accordance with the terms and conditions of the contract. The Tribe is responsible for the settlement of all contractual and administrative issues arising from their procurement action, in accordance with good administrative practice and sound business judgment. Those issues include but are not limited to source evaluation, protests, disputes, and claims.

No employee, officer or agent of the Tribe can participate in the selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. A conflict of interest would arise when any of the following individuals or organizations has a financial or other interest in the firm selected for the award: a tribal employee, officer, or agent; any immediate family of or partner of that tribal employee, officer, or agent; or any organization which

employs or is about to employ any of the previously mentioned individuals. A tribe cannot contract with a tribally-owned enterprise if the Tribe administers the procurement. There cannot be tribal preference, nor special advantages or privileged information provided to tribal members or businesses. The tribal officers, employees, or agents can neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or potential contractors.

(b) Competition Requirements: All procurement transactions will be conducted to provide full and open competition unless justification is made for restrictive or sole source procurement. These types of justification, such as exigency (urgent need), critical schedule, and equipment compatibility, will be reviewed and approved by the IHS SFC Program Director. Tribes will conduct the procurement in a manner that prohibits the use of local geographical preferences in the evaluation of bids or proposals.

(1) Indian Preference: If a tribe has enacted an Indian preference ordinance of general applicability and agrees to apply the terms of that ordinance, the Indian preference requirements of that ordinance may apply in lieu of IHS requirements as long as the effect is similar to that of IHS requirements.

In the absence of a formally adopted Indian preference policy by a tribe, preference shall be given in the award of construction and services contracts to those firms (or joint ventures) whose levels of ownership and control by enrolled Indians (or Alaska Natives) each equal at least 51 percent of the total on a continuing basis for the duration of the contract [see P.L. 93-638, as amended, Section 7(b)]. Firms (or joint ventures) who satisfactorily document such ownership and control at the time of bid or quotation shall have a prescribed amount of their total bid price deducted from the bid price when compared with other bids. The amount shall be set at a reasonable rate (normally between 5 percent and 10 percent) by the tribe and IHS. Once this deduction is made for qualified Indian firms (or joint ventures), the award will be made by the tribe to the responsive, responsible bidder with the lowest resulting comparative bid price. However, the actual amount of the contract shall be the original bid price prior to Indian preference adjustment.

(2) Solicitations: Except as allowed for an exigency under (b) above, all procurement shall be based on firm fixed price and shall be competitive. The following requirements apply:

(A) Materials, Construction, and Services (non A/E) Estimated at Less than \$2,000: The Tribe shall solicit a verbal or written quote from one or more sources qualified to do the work. The Tribe shall award a purchase order to the qualified source with the lowest quote.

(B) Materials, Construction, and Services (non A/E) Estimated at More than \$2,000 and Less than \$25,000: The Tribe shall solicit a written quote from a minimum of three (3) sources qualified to do the work and likely to submit a quote. The Tribe shall award a purchase order to the responsive, responsible source with the lowest quote.

(C) Materials, Construction, and Services (non A/E) Estimated at \$25,000 or more: Upon IHS approval, the Tribe shall advertise formally for a minimum of 15 calendar days for sealed bids to be opened publicly at a specified time, date, and place. The Tribe shall award a contract to the responsive, responsible source which has submitted the lowest bid price.

(D) Architect/Engineer (A/E) Services: The Tribe shall solicit competitive proposals from potentially interested professional firms. The Tribe shall establish objective selection criteria before soliciting proposals. Using those criteria, a three-member board will decide which firm is most qualified to

perform the work. If IHS project funds are involved, at least one Registered Professional Engineer from IHS shall serve on the Board. The Tribe shall attempt to negotiate with this firm to set fair and reasonable compensation. If negotiations with one firm are not successful, the Tribe may proceed to negotiate with the next most qualified firm. This process may continue until agreement is reached.

(3) Required Notices to Prospective Bidders: Tribes shall notify the vendors and contract bidders of the following:

- (A) Indian Preference policy for contracts and subcontracts
- (B) Minimum percentage of the work that must be performed by the prime contractor
- (C) Responsibility of the Tribe for compliance with and enforcement of the contract (i.e., the contract is not a Federal contract)
- (D) Restrictions on liens (state lien laws may not apply)
- (E) The remedy for disputes
- (F) The role of the IHS; e.g, as technical advisor, in construction inspection, and for approvals. [see (f)(2)(L) and (f)(2)(M), below.]

(c) Wage Rates: At minimum, Davis-Bacon wage rates are required for all construction contracts over \$2,000 executed by a tribe and funded by Federal agencies, except where the Federal funding is specifically exempt from Davis-Bacon requirements. The Tribe is responsible for reviewing payroll information submitted by the contractor for compliance with Davis-Bacon requirements.

(d) Bond Requirements:¹² For construction contracts exceeding \$100,000, contractor bonds are required. The IHS may accept the bonds policy and requirements of the tribe, provided the IHS determines that its interests are adequately protected; for their benefit, the tribe may require bonds on lower amounts. In lieu of such a determination, the minimum requirements shall be as follows:

- (1) A bid guarantee from each bidder equivalent to five percent of the bid price.
- (2) A performance bond on the part of the contractor for 100 percent of the contract price.
- (3) A payment bond on the part of the contractor for 100 percent of the contract price.

Bonds may be required for contracts valued at less than \$100,000 if local conditions such as the potential for liens on non-trust land or other circumstances warrant.

(e) Subcontract Amount: Prime contractors will be required to perform at least thirty-three and one-third (33-1/3) percent of the total amount of the work in the contract using their employees and equipment. [Note that this tribal contract percentage is lower than the Federal Buy-Indian contract requirement of 50 percent.] Copies of subcontract agreements may be required to verify the amount of work performed. The purpose of this requirement is to prevent all of the work from being brokered and to ensure that the contractor is available to perform warranty work.

(f) Specific Contract Provisions

- (1) General Provisions: Paragraphs 1-45 of "Schedule B, General Conditions" in Appendix B shall be included in their entirety in the tribal solicitation and contract, unless the Area SFC Program Director determines that the tribal

¹²Miller Act, 40 U.S.C. Sec. 270a

procurement system includes equivalent provisions. The Area SFC Program Director may add provisions to address project requirements.

(2) Administrative Provisions: A tribe's contract must contain the following provisions:

- (A) Administrative, contractual, or legal remedies for instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate (except for small purchases).
- (B) Termination for cause and for convenience of the Tribe including the manner by which it will be executed and the basis for settlement. (Contracts exceeding \$10,000).
- (C) Compliance with the Executive Order 11246 as amended, Equal Opportunity in Federal Employment¹³. (Contracts and subcontracts exceeding \$10,000.)
- (D) Compliance with the Copeland Anti-Kickback Act.
- (E) Compliance with the Davis-Bacon Act. (Contracts exceeding \$2,000).
- (F) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act. (Construction contracts in excess of \$2,000)¹⁴.
- (G) IHS requirements for reporting.
- (H) IHS or Tribal Indian preference requirements.
 - (i) Contact the Tribal Employment Rights Office (TERO) of the Tribe.
 - (ii) The TERO may impose certain requirements via taxes, fees, wage rates, employment policies or ordinances that may affect the contractor.
 - (iii) The contractor is required to comply with all lawful tribal requirements in the performance of the work.
- (I) Access by the Federal government and the Tribe to any books, documents, papers, and records of the contractor, which are directly pertinent to the specific contract for the purpose of making an audit or examination of excerpts and transactions.
- (J) Retention of all required records for three years after the Tribe makes final payment and all other pending matters are closed.
- (K) Compliance with all applicable environmental laws and EPA regulations including Executive Order 11738¹⁵. (Contracts exceeding \$100,000).¹⁶
- (L) An explicit statement that IHS employees cannot represent the Tribe, and tribal employees cannot represent the IHS.
- (M) The right of IHS employees to inspect the work of the tribal contractor or subcontractors.

(g) IHS Technical Assistance: IHS may provide technical assistance and technical services to the Tribe or another party to the MOA that utilizes their own procurement system for a number of different purposes related to the provision of sanitation

¹³" . . . all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions: "During the performance of this contract, the contractor agrees as follows: "(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. . . ." etc. [E.O. 11246]

¹⁴Note: On certain Federal contracts, 40 U.S.C. 329(c) (Pub. L. 87-581, title I, Sec. 103) states that Sections 103 and 107 do not apply to a contract in an amount that is not greater than \$100,000.

¹⁵E.O. 11738 prohibits grants to facilities that are in violation of those environmental acts.

¹⁶Common Rule, 45 CFR 92.36(i).

facilities authorized by P.L. 86-121. Examples of such technical assistance activities include assisting with contract administration, construction staking, preparation of plans and specifications, etc.

Technical services, technical assistance or oversight responsibilities outlined in the MOA and provided by IHS staff cannot create, or appear to create, a contractual relationship with the tribal contractor, supplier, or other entity who is not a party to the MOA. Examples of inappropriate activities include acting as the Tribal contracting officer's representative, performing procurement functions (obtaining quotes), acting as receiving agent, or performing any activity which may be interpreted as the IHS acting as an agent of the Tribe or other party.

IHS staff providing technical assistance or technical services shall have training and experience comparable to that required of Government employees who are authorized to act for the Government on similar matters; e.g., engineers should not be charged to provide technical assistance on contract administration without adequate training.

(h) IHS Oversight Inspection Responsibility: IHS has the responsibility to insure that tribal procurement procedures are adequate to protect the Federal government's interests and insure that the purposes of the MOA and Project Summary are accomplished. IHS inspection of facilities constructed through tribal procurement is part of this oversight responsibility; IHS employees or contracted representatives must complete an appropriate level of inspection on each project.

(1) Inspection of Tribal Contractor's Work: IHS employees can inspect the construction and advise the Tribe whether the construction meets the minimum standards stated in the contract. This does not necessarily imply compliance with the Tribe's contract, but the Tribe's contract should be such that the contractor's minimum standards are met or exceeded. IHS can advise the Tribe (not the contractor) whether the construction meets the IHS interpretation of the contract requirements. IHS cannot be the Tribe's construction inspector for these reasons:

- (A) Doing so could create, or appear to create, a contractual relationship between the contractor and the IHS.
- (B) Construction inspection activities by IHS employees "could create explicit or implicit obligations" on behalf of the Tribe.
- (C) The government employees would be working beyond the scope of their duties and would be jeopardizing those protections extended to federal employees working within the scope of their employment.

(2) Communication Between IHS and Tribal Contractors: In order to minimize the possibility of creating or appearing to create a contractual relationship or the possibility of IHS employees representing the Tribe, the following guidance is provided:

- (A) If directed by the Tribe, contractors may submit copies (originals sent to the Tribe) of information such as submittals, progress payments, change order requests, etc., directly to the appropriate IHS office when technical assistance is required or requested by the Tribe.
- (B) All direction to the contractor shall come from the Tribe. IHS should submit any and all recommendations to the Tribe for its decision.
- (C) All discussions about the contract with the Tribe's contractor that include IHS employees shall be conducted by and with direct participation of tribal employees.
- (D) IHS may not make commitments or give direction to the Tribe's contractor.
- (E) IHS should not communicate in writing to the Tribe's contractor.

(i) IHS Approvals: IHS should review and approve tribal solicitation and contract documents in accordance with the terms and provisions of the project MOA and as described below. IHS Area procedures should be such that any recommendation to a tribe by an IHS official is adequately reviewed; e.g., evaluating change order requests. Certain activities are not appropriate when they create or appear to create a contractual relationship with the Tribe's contractor. An example of an inappropriate IHS activity is the approval of a payment from the Tribe to its contractor.

(1) Approval of Contract Documents and Unit Costs: The MOA shall require that the IHS Area-level representative designated in the MOA must approve the Tribe's proposed contract documents and costs before the Tribe advertises contracts, awards contracts, makes contract changes, or obligates itself in other transactions. The MOA shall prescribe the methods by which unit costs and work authorizations will be approved. The parties must recognize that any increase in previously agreed upon unit costs may result in a reduced scope of work (e.g., fewer houses served), unless additional funds are made available.

(2) Final IHS Approval of Construction: The Tribe must conduct a final inspection of the facilities provided under the contract and include the contractor, IHS representatives, and other interested parties. The Tribe should be advised that final acceptance and payment for the work by the Tribe should not occur until the contractor has corrected all deficiencies identified during the final inspection and until the work is in full compliance with the plans, specifications, and other contract requirements.

The inspections by IHS insure that the completed work complies with all Government requirements. The final IHS contribution for the project will not be released to the Tribe until the IHS has participated in a final inspection and determined that the work complies with all Government requirements.

(j) Legal Review: The Tribe may request an attorney review the proposed procurement documents for the project. If legal review is included as an MOA provision, the IHS may contribute funds for the reasonable cost of contract review by a local attorney.

Sec. 3. Procedures Common to Tribal Force Account and Tribal Procurement:

(a) Tribal Fund Controls

(1) Tribal Financial Management Standards: The Tribe must provide the following controls in its financial management system if it receives Federal funds for a sanitation facilities project:

(A) Financial Reporting: An accurate, current, and complete disclosure of the financial transactions of the project must be made in accordance with the financial reporting requirements of the MOA and in accordance with these guidelines. The requirements for cost accounting reports for tribal force account are covered in Section 1(g).

(B) Accounting Records: The Tribe must maintain records which adequately identify the source of the Federal funds and how those funds were expended.

(C) Internal Controls: Effective control and accountability must be maintained for all cash, real and personal property, and other assets acquired by the Tribe.

(D) Budget Analysis: Actual expenditures must be compared with budgeted amounts for each project.

(E) Allowable Costs: Applicable OMB cost principles (OMB Circular A-87) and the terms of the MOA will determine if project expenditures are reasonable, allowable, and allocable.

(F) Source Documentation: Accounting records must be supported by source documents including canceled checks, paid bills, payrolls, time and attendance records, and contract documents.

(2) MOA Contribution Payments

(A) Contributions: Proposed contributions to the Tribe from IHS and other sources shall be as provided for in the MOA. Total amounts contributed will be for work accomplished; e.g., for approved tribal contract amounts plus appropriate administrative support fees. The purpose, timing, maximum amount, and method of requesting contributions will be clearly stated in the MOA.

(B) Financial Account: The Tribe must maintain a separate financial (bookkeeping) account for each project that it is administering, not necessarily a separate bank account.

(C) Cash Flow Schedule: The Tribe must submit a project cash flow schedule. The Tribe and IHS must minimize the time elapsed between fund transfer from IHS to the Tribe and disbursement by the Tribe.¹⁷

(D) Advances¹⁸: The IHS may provide a contribution to the Tribe in advance of construction to purchase or rent equipment and materials to prepare for construction.

- (i) This initial advance should be kept to the minimum necessary and shall not exceed 25 percent of the tribal project budget.¹⁹ Upon initiation of construction, the Tribe may request additional funds consistent with the approved project budget, work accomplished, and cash flow schedule.
- (ii) Advances proposed in the cash flow schedule must be tied to anticipated expenditures in the next time interval and must minimize the time between transfer of funds and disbursement by the tribe, tribal organization, or contractor.²⁰ Before issuing subsequent advances, IHS will compare previous advances versus actual expenditures by the Tribe. Based on this information, adjustments may be made in the cash flow schedule.
- (iii) Interest in excess of \$100 per year earned on advances must be returned to the project account.²¹

(3) Allowable Costs: The criteria in OMB Circular A-87 (see Appendix D) and those costs agreed upon in the MOA will determine all allowable costs under the project including special requirements for non-Federal funds. Some examples of expenses that may not be charged to the project include bad debts, some consultant fees, fees for some types of legal work, bonus payments to contractors,

¹⁷Common Rule, 45 CFR Subtitle A, HHS, Sec. 92.20(b)(7) Cash management. Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used.

¹⁸"Also, since the authority to advance funds must, at least in a general sense; be founded on the program legislation," [GAO, Principles of Federal Appropriations Law, Vol. II, Page 10-47] See next footnote.

¹⁹This advance percentage is generous and Areas should adhere to it. Consider that there is a general prohibition against making advance payments under government contracts at 31 U.S.C. Sec. 3324(b) which states, "An advance of public money may be made only if it is authorized by . . . a specific appropriation or other law . . .," and 41 U.S.C. Sec. 255(f)(2), "Advance payments made under subsection (a) of this section for commercial items may include payments, in a total amount of not more than 15 percent of the contract price, in advance of any performance of work under the contract."

²⁰*Id.*

²¹Common Rule, 45 CFR Subtitle A, HHS, Sec. 92.21(e)(i).

damages from lawsuits, fund-raising expenses, entertainment, interest, fines, and penalties.

(4) Indirect Costs: Indirect Cost Negotiation (IDC) Agreements are established between many tribes and the Federal Government in accordance with OMB Circular A-87. IDC Agreements establish standard rates for the indirect costs incurred by tribes that administer their programs. During the drafting of the Project Summary and the development of the cost estimate, the Tribe and the IHS decide whether the IDC Agreement rates or the Project Administrative Support Fees, described below, will be used for the project. Federal funds passed through the Tribe to construction contractors and subcontractors are typically not included in IDC Agreements, although a few IDC Agreements may allow the rate to apply to pass-through funds.

(5) Project Administrative Support Fees: Project Administrative Support Fees (ASF) may be paid to the Tribe for program administration when the Tribe does not have an IDC Agreement. The ASF is intended to cover the cost of that portion of the salaries and benefits of those tribal employees associated with project administration as well as all other allowable costs not specifically allocated to the project. Such fees shall be established jointly by the Tribe and IHS to reflect anticipated costs under a given MOA, but cannot exceed the amounts stated in Table 6-1 for tribal procurement and tribal force account. In the absence of data to support different fees, the following sliding scale shall be used for tribal construction and supply contracts:

Table 6-1. Tribal Procurement Administration Support Fees	
Cumulative Dollar Amount	Administration Fee (Not to Exceed)
\$0 to \$25,000	4 percent of the contract amount
\$25,000 to \$200,000	\$1,000 plus 3 percent of the contract amount in excess of \$25,000
above \$200,000	\$6,250 plus 2 percent of the contract amount in excess of \$200,000

Table 6-2. Example calculation of ASF, assuming contract amount is \$250,000				
Cumulative Dollar Amount from first column Table 6-1	Project Cumulative Dollar Amounts	Administration fee percent from Table 6-1		
\$0 to \$25,000	\$25,000	x	4.00%	= \$1,000
(\$200,000 - \$25,000) =	\$175,000	x	3.00%	= \$5,250
(\$250,000 - \$200,000) =	\$50,000	x	2.00%	= \$1,000
	\$250,000	Calculated ASF (about 3% of project cost)		= \$7,250

For force account work performed by the Tribe, the administrative fee shall be paid to the Tribe in proportion to tribal disbursements for force account labor. For the force account portion of the project, the maximum amount for the ASF shall be 10 percent of the labor disbursement amount. This amount shall be reduced proportionately on projects where IHS or other party performs the planning and administrative functions, or where economies of scale call for a reduction in the ASF. Each Area should develop additional guidance on the proper fees for these project services specific to the Area.

(6) Unexpended Funds: The tribe shall return unexpended funds within [*] days after the completion of the project construction phase. [*select period from 30 to 90 days]

(7) Project Audits: The MOA must include a provision that the IHS shall have access to all tribal project records and that the IHS may request a project audit by the Tribe at any time. If appropriate, compensation for the audit may be provided to the Tribe.

(8) Budget Changes: Any changes by the Tribe in the project scope and/or project budget must be reviewed and approved by IHS as stated in the MOA.

(9) Prohibited Practices:

(A) Funds for construction projects under an MOA may not be loaned or intentionally invested.

(B) Funds from one IHS funded construction project cannot be used for cash flow or other unauthorized purposes for another IHS funded construction project.

(10) Financial Reporting: If financial reports are required by IHS, the frequency will not exceed once per quarter. The financial reports should contain sufficient information to allow tracing project expenditures to insure that Federal funds were not used in violation of any restrictions or prohibitions. Financial reports are separate from the cost accounting and progress reports for project construction which may be required monthly or weekly, depending on the size of the project.

(11) Project Closeout Requirements: The IHS will close out the project in accordance with Area guidelines and the Criteria document when it determines that all applicable administrative actions and all required project work are complete. A closeout report from the MOA participants may be required by IHS after completion of the project and the return of all unused funds.

(b) Tribal Records and Property Management

(1) Retention and Access Requirements for Records: Except as provided below, project records must be retained for three (3) years from the project completion date. These records shall include all financial records, supporting documents, and procurement documents including but not limited to time sheets, canceled checks, invoices, purchase orders, and contracts. The Tribe must make these records available upon request by the IHS, the U.S. Comptroller General, or their designated representatives.

If any litigation, claim, negotiation, audit, or other action involving the records begins before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from the action, or until the end of the 3-year period, whichever is later.

(2) Equipment: Title to equipment acquired by the Tribe for its exclusive use under a project vests with the Tribe upon acquisition. The Tribe must maintain property records for that acquired equipment. The MOA will describe equipment use and designate ownership.

If IHS provides Federally-owned equipment to the Tribe for use on the project, the title will remain with the Federal Government unless otherwise officially transferred. The Tribe must maintain and manage the equipment in accordance with IHS policy and any applicable use permit or agreement.

(3) Real Property: Title to real property acquired by the Tribe under the project vests in the Tribe upon acquisition. In the case of sanitation facilities or related improvements to real property on tribal lands, ownership vests with the Tribe.

- (4) Supplies: Ownership of construction materials and supplies properly acquired by the Tribe under the project vests in the Tribe upon acquisition. If, after construction is completed, more than \$5,000 of unused tribally-procured supplies and materials remains, the IHS and the Tribe must work out an agreement for the disposition of those items.

CHAPTER VII. Third-Party MOAs

Other Federal agencies or non-Federal third-parties may express an interest in participating in a sanitation facilities project; participation may consist of contributing funds, doing the work themselves, procurement, or a combination of the former. Third-party participation may be advantageous if the third-party has the construction expertise or the administrative capability to provide the sanitation facilities. For some projects, the circumstances will dictate whether the actual construction and project administration must or should be carried out by a third-party; e.g., when the non-tribal third-party owns the existing sanitation facilities.

Third party MOAs, in addition to the Chapter III provisions, include provisions for:

- Contributions
- Transfer and Ownership
- Lead Agency

Sec. 1. Eligible Third-party Participants: Third-parties are parties to the MOA other than the IHS and the Tribe receiving the Federal assistance. The third-parties can be entities created within state and local governments, regional or rural water/sewer districts, water associations, housing authorities, and private corporations which perform a regulated public function; e.g., a private water company. Third-parties could include Federal-state regional commissions, private foundations, and community groups. Third-parties can also include other Federal agencies, Indian housing authorities, non-IHS Indian health clinics, or other non-profit organizations as defined in Chapter I.

Although almost any organization defined in Chapter I, Section 2(b) can be a third-party for purposes of contributing resources towards a project, there are limitations with respect to who can actually accomplish the work. A third-party may accomplish the work under an MOA if it has an interest in the facilities or services to provide and if the MOA calls for substantial involvement by IHS in carrying out the project for the benefit of eligible American Indians or Alaska Natives. A procurement contract must be used if the Government's principal purpose is to "acquire" an intermediary's services and the intermediary has no interest in Indian health; e.g., contracting with a well drilling company.

Sec. 2. Administration by a Third-party: On some P.L. 86-121 projects, the IHS project funds and other contributions are transferred to the third-party to administer the project and perform the actual construction using IHS requirements. The third-party receiving the funds may be responsible for the overall project including the preliminary activities, design, bidding, construction, and closeout stages. Although such projects are usually completed by competitive bid (open market) contracts, the projects may be completed by force account construction, or by a combination of force account and contract procedures.

(a) Third-party Force Account: If approved by the IHS, the third-party performing the work may elect to construct the project by force account. The third-party must comply with all IHS requirements as described in Chapter VI, Section 1 of these Guidelines, substituting the "third-party" for "tribe."

(b) Third-party Procurement: If approved by IHS, the third-party performing the work may elect to construct facilities using its own procurement procedures. The third-party shall comply with all IHS requirements as described in Chapter VI, Section 2 of these Guidelines, substituting the "third-party" for "tribe."

(c) Procedures Common to Third-party Force Account and Procurement: The provisions of Chapter VI, Section 3 of these Guidelines shall apply (substituting the "third-party" for "tribe") for projects where a third-party performs the work using either force account or procurement.

Sec. 3. Transferring Facilities to a Third-party: Where community facilities are owned (upon acquisition) or transferred to a non-Indian third-party, the MOA shall provide for equitable user fees for Indian residents, taking into account the value of any capital improvements made or funded by IHS.

Sec. 4. Administrative Policies and Procedures:

(a) Sometimes, if there are two or more organizations or governmental entities as parties to the MOA, the Tribe may have to comply with each party's regulations and requirements. To the extent practicable, the participating agencies should reach an agreement as to which agency's regulations and requirements will govern the execution of the project to alleviate any regulatory burden on the Tribe.

(b) When another agency enters into an interagency agreement to transfer project funds and responsibilities to the IHS, IHS administrative policies and procedures will generally apply (e.g. procurement, environmental review, and audit procedures) subject to any specific mutually agreed upon provisions in the interagency agreement.

(c) The IHS SFC Program performs an environmental review and determination on IHS funded sanitation facilities construction projects except P.L. 93-638 Title V construction projects. The environmental review (including NHPA review) insures that the IHS considers the environmental consequences of its proposed actions, applicable permits are obtained, and appropriate procedures are implemented.

(1) The IHS is responsible for the NEPA environmental determination of an IHS funded project or for its portion of the work on a project when another authorized entity is designated as the responsible agency in the MOA or in a separate lead agency agreement. The IHS responsibility on multi-agency projects is dependent on several conditions including the degree of IHS involvement, funding, and the type of project.

(2) On P.L. 93-638 Title V construction projects, the Tribe assumes all the Federal environmental and historic preservation responsibilities as mandated in Section 509 of that Act.

(3) If the IHS references another agency's environmental document in its environmental determination, the IHS must have a copy of the other agency's environmental statement in the project file.

(4) On projects where contributed funds are not transferred directly to the IHS (i.e., another Federal agency is responsible for the environmental and historic preservation requirements of the project), before the IHS participates in the project to provide sanitation facilities, the IHS shall make its own environmental determination. The IHS may review the other agency's environmental document and supplement that environmental document to meet IHS needs.

- (A) Normally, on NAHASDA²²/HUD projects and CDBG²³ projects, the Tribe assumes the Federal responsibility for NEPA and NHPA, or HUD is responsible for the NEPA environmental determination, for the entire housing project including any sanitation facilities for the project. The responsibility of the Tribe or HUD does not change even if funds are contributed to the IHS for construction of the sanitation facilities. (Rationale: If the Tribe or HUD did not fund the construction of the houses, the IHS would not be participating in the project.) Nevertheless, IHS must make its own environmental review and determination.
- (B) Agencies that provide grants or loans are responsible for performing the NEPA environmental determination prior to award; e.g., EPA Clean Water Act and Safe Drinking Water Act Indian Set-Aside programs and Rural Utilities Service/Rural Development grants or loans. Nevertheless, IHS will make its own environmental review and determination if it participates in a project funded by those other agencies.
- (C) If funds are transferred from IHS to another Federal agency, prior to executing the transfer of funds, the agencies should decide which party will perform the environmental review and determination and the agencies should document that decision in writing.
- (d) Although the MOA could designate the lead agency, the preferred method is to use a separate agreement designating a lead agency among the participating Federal agencies and the Tribe. A separate agreement would prevent the MOA execution from being delayed because of disagreements over the lead agency responsibilities or over which agency is the lead agency.

²²Native American Housing Assistance and Self-Determination Act

²³Community Development Block Grant

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APPENDIX A

MOA Provisions

MOA PROVISIONS

Set forth in this Appendix are clauses for MOAs; the principal clauses were reviewed by OGC. All MOA's must have a heading, preamble, agreement provisions, and signature blocks as described in Chapter III, Section 1(a). In addition, all MOAs must have certain agreement provisions, which are listed in Chapter III, Section 1(b). Although the clauses included in this appendix are examples, it is expected that similar, if not identical, clauses will be used by each Area. Those clauses marked with a (r) are to be used nearly verbatim. The clauses are arranged as follows:

- A1. Heading
- A2. Preamble
- A3. General Provisions
 - Tribal Lands
 - Homes Served
 - IHS Contributions
 - Representatives
 - Transfer of IHS Owned Facilities
 - Transfer of Tribal Owned Facilities
 - Operation and Maintenance Fees and Ordinances
 - Project Schedule
 - Tribal Financial Management Standards and Procedures
 - Project Closeout
 - Warranties
 - MOA Disputes
 - MOA Termination
 - Signature Blocks
 - [attached Project Summary]*
- A4. Provisions for Government Force Account
- A5. Provisions for Tribal Procurement
- A6. Provisions for Tribal Force Account
- A7. Provisions for Third Party MOAs
- A8. Example USDA RUS MOA
- A9. Example NAHASDA/HUD MOA

AUTHORITY

The IHS MOA is a legal obligating instrument entered into by the IHS and the Tribe to create, fund, and sometimes construct sanitation facilities projects authorized by Public Law 86-121, 42 U.S.C. 2004(a). Other agencies (EPA, RUS, TDHE) may also be a party to the MOA when they contribute funds to the IHS project; the IHS MOA documents their contributions to the project. Nevertheless, the MOA is primarily an agreement between the IHS and the Tribe; therefore, the MOA should not be used to impose another agency's requirements on the IHS or the Tribe.

¶ A1. HEADING:

MEMORANDUM OF AGREEMENT
Between
THE INDIAN HEALTH SERVICE
and
(Name of Indian Tribe, Band, Group, or Community)

(Reservation, Location)

Public Law 86-121
Project YY-XXX

*Use "Between" for 2 party
MOAs and "Among" for
more than 2 parties.*

or

MEMORANDUM OF AGREEMENT
Among
THE INDIAN HEALTH SERVICE
(Name of Indian Tribe, Band, Group, or Community)
and
THE DEPARTMENT OF AGRICULTURE RURAL UTILITIES SERVICE

(Reservation, Location)

Public Law 86-121
Project YY-XXX

¶ A2. PREAMBLE:

1. This agreement is made between the Indian Health Service, acting through the Director, _____ Area Indian Health Service, Department of Health and Human Services, under and pursuant to the provisions of Public Law 86-121 (42 U.S.C. 2004a; 73 Stat. 267), and the Indian Tribe, Band, Group, or Community), (Reservation, Location), hereinafter called the (Tribe) (Band) (Group) (Community), acting through the (Organization Designated to Represent the Indians).
2. WHEREAS, the (Tribe) (Band) (Group) (Community) is desirous of obtaining (satisfactory water supply) and (adequate waste disposal) facilities for (location), and
3. WHEREAS, the (Tribe) (Band) (Group) (Community), acting through the (Title of Person Designated to Represent the Indians), by a project proposal submitted to the Indian Health Service, dated _____, requested assistance under Public Law 86-121 in the (construction, improvement, installation, rehabilitation, etc.,) of (water supply, sewage disposal, refuse disposal, etc.,) on the (Reservation, Location), and
4. WHEREAS, the Indian Health Service is desirous of assisting in the (construction, provision, rehabilitation, etc.,) of (water supply, sewage disposal, and refuse disposal) facilities for the Indians on the (Reservation, Location), as a means of improving the health of the residents, and
5. WHEREAS, the (Tribe) (Band) (Group) (Community) have reviewed and concur with the provisions of the attached Project Summary.
6. NOW THEREFORE, in order to carry out the project as set forth in the attached Project Summary entitled, _____, and dated _____, the parties mutually agree:

A3. GENERAL PROVISIONS

Tribal Lands

1. That the Tribe hereby grants permission for the IHS and its representatives to enter upon or across tribal lands for the purpose of carrying out the project outlined in the attached Project Summary and as provided for in this agreement and further agrees to waive all claims which may arise by reason of such entry upon Tribal lands, except those that may be recognized under the Federal Tort Claims Act.

2. That the Tribe will obtain all rights-of-way on or over Tribal lands as in the judgment of the IHS may be necessary for the provision and operation of any facilities provided for hereunder and waives any claims for compensation and damages therefor.
3. That the Tribe will provide without charge to the IHS all tribal land necessary and required for the construction of the facilities as provided for in the Project Summary. All interests in such lands, easements, and rights-of-way shall remain with the Tribe, except as otherwise provided for in this Agreement.

Historic preservation, cultural properties, discovery:

4. That the Tribe will provide, without charge, assistance in complying with the regulations (36 CFR 800) implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) by informing IHS of any traditional cultural properties which might be affected by construction of the project. The Tribe shall take appropriate steps to identify traditional cultural properties which could be affected by the project, including contacting traditional cultural leaders or other tribal members who may have knowledge about such locations, sites, or objects.
5. That the IHS shall consult with the Tribe regarding excavations that may result in inadvertent discovery of human remains in accordance with the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001) and the implementing regulations at 43 CFR Part 10. This Agreement shall serve as official notice to the Tribe that the proposed sanitation facilities construction may result in inadvertent discoveries, and that any such discoveries shall be subject to the above regulations, including consultation between the IHS and the Tribally designated cultural resources representative and disposition of human remains or related cultural items. If the Tribe is administering construction of the sanitation facilities, through a Tribal contract or force account, it shall assume full responsibility for compliance with 43 CFR Part 10. [Note: The IHS remains responsible for complying with the regulations implementing Section 106 of the National Historic Preservation Act regarding post-review discoveries at 36 CFR 800.13]

Homes Served

6. That the Tribe shall provide a prioritized list of Indian homes to be served under this project. Changes or deletions of homes may be made by the Tribe at any time prior to actual construction providing that such changes are made in writing by the appropriate Tribal official. All homes must be found to meet eligibility and feasibility criteria by the IHS. The actual homes to be served under this project will be determined by the IHS from the applications submitted by the Tribe.
7. That the Tribe shall assure and provide for, at no cost to the IHS: water and sewer lines to be extended to a point five feet outside homes approved for service; power and adequate electrical facilities, including proper electrical service entrance, to be available at each home; and homes to be properly winterized, including skirting for mobile homes, to protect facilities from freezing.
8. That the IHS shall make final determinations and notify the Tribe on whether individual participants and sites qualify for sanitation facilities, taking into account the recommendations by the Tribe.
9. If additional participants are to be served, a letter amendment to this agreement is required by IHS and the Tribe prior to any additional construction. This amendment will describe the numbers and types of additional services to be provided, and the maximum additional contribution, if any, to be made by IHS.
10. That the IHS reserves the right to delete from the project any home for which eligibility requirements have not been met by (date), and to withdraw from the project any or all funds intended to serve those homes.

Tribal Contributions

11. That the Tribe will contribute to the IHS prior to the start of construction the sum of \$_____ as a contribution on its behalf toward the provision of the facilities described in the attached Project Summary. These funds will be administered in accordance with regulations governing operations of the IHS.

IHS Contributions

12. That the IHS will provide without charge to the Tribe:
 - a. All materials, supplies, equipment, and labor for the installation of (individual or community) water supply and (individual or community) waste disposal facilities as provided for in the attached Project Summary, and not otherwise provided for in this agreement.

- b. The instructions as to the proper utilization, maintenance, operation, and protection of the facilities provided for herein.

Project Funding Synopsis

13. Project Funding (not to exceed) [List total fund contributions from all participants, including IHS P.L. 86-121 project funds.]:

IHS	\$
Tribe	\$
[TDHE]	\$
[Others]	\$
TOTAL	\$

14. The IHS shall utilize project funds in the amount of \$_____ for IHS project technical support expenses. Project technical support expenses shall include IHS expenditures for technician and clerical salaries, GSA vehicles, and miscellaneous project related expenses.

15. The IHS will release contributions to the Tribe as provided for in Paragraph _____ of this MOA, upon:

- a. Execution of this Agreement by all parties,
- b. Receipt of written request from the Tribe for the required funds, and
- c. Certification from the IHS Project Engineer that the amount of funds requested is required to make timely payments in accordance with the project budget for the supplies, materials, equipment, and services being obtained under the provisions of this Agreement.
- d. Approval by the IHS Area office.

Representatives

16. That the Tribe will provide one or more representatives to coordinate the conduct of tribal participation under this agreement, including: active promotion of attendance of Indian beneficiaries at meetings, obtaining consent of each participating Indian family on forms furnished by the IHS; obtaining cooperation of tribal members in the fulfillment of labor responsibilities assumed by the Tribe under this agreement; and attendance at the final inspection.

17. That the IHS Project Engineer shall coordinate IHS participation in the project.

Transfer of IHS Owned Facilities

18. That in consideration of the contributions made and the responsibilities undertaken herein by the Tribe, upon completion of the project, the IHS will transfer all rights, title, and interest to the Tribe without charge, the community facilities, including all rights-of-way, materials, supplies, and equipment provided therefor and incorporated therein pursuant to this agreement.

19. That the Tribe hereby agrees to accept the transfer of such community facilities and to operate and properly and efficiently maintain and repair said facilities and equipment as the property of the Tribe so as to keep them in an effective and operating condition.

20. That in consideration of contributions made and the responsibilities assumed herein by the Tribe and the individual Indian residents of the (community or reservation) upon completion of the project, the IHS will transfer to the head of each Indian household without charge the individual facilities and appurtenances provided for in this agreement, and the head of each household will thereafter be responsible for the maintenance and repair of such individual facilities as his own property so as to keep them in an effective and operating condition.

21. That when the community facility or each operational unit of the community facility is completed, it will be inspected by the IHS with representatives of the Tribe to detect possible construction deficiencies. A punch list of these deficiencies, if any, will be compiled and agreed upon. These deficiencies will be corrected by the responsible construction agency. At that time, a final inspection of the facility or operational unit of the facility will be made. When acceptable to all parties, ownership of the facility or operational unit

will be transferred to the Tribe and it will be placed into operation so as to provide services to the consumer. When operation commences, the operation and maintenance of the facilities will become the responsibility of the Tribe.

Transfer of Tribal Owned Facilities

22. That all parties understand that the facilities constructed (including equipment, land, and supplies purchased) under this agreement with IHS or contributed funds are at no time the property of the IHS, but rather belong to the tribe, which shall operate and maintain such facilities properly, until or unless transferred to other parties.

23. That, because the IHS will not at any time own the facilities constructed, no formal transfer agreement may be necessary. IHS may develop a transfer agreement or, in lieu of a transfer agreement, the IHS will notify the Tribe by registered mail when IHS participation in the project is complete.

24. That the Tribe shall transfer on-site water and waste facilities to individual homeowners. Upon completion of the construction the homeowners are responsible for operation and maintenance of the facilities. Facilities constructed under this agreement at all times belong to the Tribe until transferred to individual homeowners or other parties.

Operation and Maintenance Fees and Ordinances

25. That the Tribe will establish connection fees and user rates and collect such charges from individuals served by the system as are necessary to sustain the operation, maintenance, and repair of the community water supply and sewerage systems. As an alternative, the Tribe may provide this revenue from another dedicated revenue source.

26. That the Tribe agrees to enact and enforce appropriate ordinances or regulations governing: (1) Connection to the community water supply and sewerage systems by the residents of the (community or reservation); (2) the methods and materials to be used in making connections to the community water supply and sewerage systems in a safe and sanitary manner; and, (3) the continued operation, maintenance, and repair of individual water supply and waste disposal facilities in a safe and sanitary condition by the persons served thereby.

Project Schedule

27. That in the interest of coordination, understanding, and economy, before construction of the project begins, the IHS Project Engineer in consultation with the Tribe shall prepare a work plan and priority for the scheduling and conduct of the project. The work plan will specify the facilities to be installed and a time schedule (and budget) for completing the work. The work plan may be modified or amended by the Project Engineer when necessary to carry out the project.

28. That it is important that the installation of the water supply and waste disposal facilities provided for herein be completed as soon as is practicable in accordance with the schedule of the IHS project officer.

29. If In the event that actual construction of this project cannot be initiated for any reason by [date] , the IHS reserves the right to cancel the project and use the funds earmarked therefor for other projects which lack impediments to prompt construction. If the condition which impeded construction is resolved following such cancellation, the IHS will give high priority to funding the project from appropriated sanitation facilities funds available at the time or from future appropriations for sanitation facilities.

Tribal Financial Management Standards and Procedures

30. The Tribe shall provide the following features in its financial management system:

- a. The Tribe shall maintain original accounting records which accurately identify the source and application of all project funds it receives. The source documentation shall include cancelled checks, paid bills, payrolls, time and attendance records, purchasing documents, and financial records. Accurate, current, and complete project records shall be reported in accordance with other provisions of this Agreement.
- b. The Tribe shall maintain effective controls and accountability for all cash, real and personal property, and other assets acquired.
- c. The Tribe shall compare actual Tribal expenditures with budgeted amounts for the project.

d. Applicable OMB cost principles (OMB Circular A-87) and the terms of this Agreement shall govern in determining the reasonableness, allowability, and allocability of all costs under the project.

31. The Tribe shall maintain a separate financial account for the project.

32. The Tribe shall submit a projected cash flow schedule. The Tribe and IHS shall minimize the time elapsed between fund transfer and disbursement.

33. Interest in excess of \$100 per year earned on cash advances (Federal funds) must be returned to the IHS project account.

34. Funds for construction projects under this Agreement shall not be borrowed or intentionally invested. Funds from one IHS funded construction project shall not be used for cash flow or other unauthorized purposes or for another IHS funded construction project.

35. Project support fees not to exceed the amount of \$ _____ will be paid to the Tribe in lieu of indirect costs. These fees are to cover the cost of a portion of the salaries and benefits of those tribal employees associated with project (not program) administration. For force account work performed by the Tribe, the administrative fee shall be paid to the Tribe in proportion to tribal disbursements for force account labor. Direct costs such as printing, copying, advertising, and accounting fees may be paid in addition, if approved in advance by the Director, Sanitation Facilities Construction.

36. Any proposed changes by the Tribe in the project scope and/or budgeted costs must be reviewed and approved by IHS as provided for in this Agreement.

Project Closeout

37. The IHS will close out the project when it determines that all applicable administrative actions and all required project work has been completed. The Tribe shall return unexpended funds within [†] days after the completion of the project construction phase. The Tribe shall submit a closeout financial report after completion of the project and return of all unused funds. **[†enter period from 30 to 90 days]**

38. Except as otherwise provided, project records shall be retained for three years from the project completion date. These records include all financial records, supporting documents, procurement documents, titles, equipment records, including but not limited to: time sheets, cancelled checks, invoices, purchase orders available upon request by the IHS, Inspectors General, or other designated representatives. The Tribe shall be subject to audit in accordance with the requirements of the Single Audit Act.

39. If any litigation, claim, negotiation, audit, or other action involving the records has been started before the expiration of the 3-year period, the records shall be retained until completion of the action and resolution of all issues which arise from it, or until the end of the three-year period, whichever is later.

Warranties

40. That the IHS (Tribe) to the extent economically feasible, will obtain a 1-year warranty for the Tribe and head of household from the IHS (Tribal) contractors, suppliers, and manufacturers on equipment, work, and supplies provided by them. The IHS shall assist the Tribe or head of household in obtaining the benefits and protection of all warranties on equipment or work provided under this Agreement. In the event of a problem occurring within the first year of installation with the design or construction of IHS (Tribal force account) installed facilities, equipment, or work not protected by the warranties of the suppliers or manufacturers, the IHS will correct the problem, subject to the availability of funds and staff resources, as determined by the IHS.

MOA Disputes

41. The parties to this Agreement agree to resolve all disputes regarding the provisions of this agreement among the parties through the IHS Area's established administrative procedures, first. If a dispute cannot be resolved locally, the parties agree that the next administrative procedure is an appeals board established at the IHS headquarters level, which will make a recommendation to the IHS Director, who will exercise final authority for the IHS in the administrative review of all disputes.

MOA Termination

42. ☒ Any party to this Agreement may terminate its relationship with the other parties prior to project completion upon ___ days notice in writing to all other parties.

Signature Blocks

43. IN WITNESS WHEREOF, the parties have subscribed their names:

For the Tribe:

_____ (Signature)	_____
_____ (Title of Signer)	_____ (Date)
Having been duly authorized to enter into this agreement on behalf of the (name of tribe), as evidenced by the attached copy of the resolution made by the (organization designated to represent the Indians).	

For the Indian Health Service:

_____ (Signature)	_____
_____ Director, (name of IHS Area)	_____ (Date)
Department of Health and Human Services	

Project Summary

Attach copy of Project Summary.

A4. PROVISIONS FOR GOVERNMENT FORCE ACCOUNT

Tribal Labor and Administrative Supervision

The Tribe will be responsible for the active administrative supervision of Tribal workers in the fulfillment of labor responsibilities assumed by the Tribe under this agreement. This supervision shall include: 1) Hiring, 2) General Assignment, 3) Timekeeping, 4) Paying, 5) Promoting, 6) Rewarding 7) Suspending, 8) Disciplining, and 9) Removing employees. The technical direction to the Tribal employees will be provided by the IHS Project Engineer and by the Foreman who will be responsible for Specific Assignment, Technical Direction, and Review of work on a routine basis. The Administrative supervision will include hiring in accordance with all prevailing local, state and Federal laws and regulations as well as sound business practices. An allowable Tribal charge of two percent of the Construction Account for administrative supervision is an acceptable project cost. This payment includes compensation for all administrative project support costs related to the administrative supervision function for this project. The cost of accounting, tax filing and insurance processing are not included in the administrative project support cost. These services are an allowable project cost. Assistance is generally needed in guiding the local government, so professional services (i.e., CPA firm) are recommended to accomplish these tasks. Payment for these services is an allowable project cost.

Labor

The Tribe will hire the labor force to construct the project facilities. The IHS project engineer working with the Project Foreman and Tribal Project Administrator will determine what positions, technical skills, number of workers and work schedules are necessary for the project. A list of local worker applicants will be reviewed by the foreman for particular positions based upon background, training, experience, and references. Qualified workers will be hired by the Tribe and assigned to work under the technical supervision of the IHS Project Foreman. For pay purposes, time sheets will be submitted by the Project Foreman to the Tribal Project Administrator on a bi-weekly basis. Attendance and performance standards will be developed during the project planning phase. Problems with individual worker compliance with these standards shall be immediately brought to the attention of the administrative supervisor. If existing workers need to be released for poor performance or additional workers are needed, the Project Foreman communicates these needs to the Tribal Project Administrator and the required actions are handled by the local government.

Construction Safety and Liability

The local project management and technical direction is normally provided by the IHS Foreman. The Foreman's role also includes the responsibility for providing proper and safe tools and equipment, instruction on proper safety practices, and assurance that they are being reasonably followed. All Tribal workers must be covered by proper workman's compensation insurance. This will normally be covered through a separate workmen's compensation insurance policy retained by the Tribe. The Foreman has the authority to immediately remove any worker whose performance or conduct creates an apparent safety problem, after which the incident will be reported to the Tribal Project Administrator. The IHS assumes the responsibility to work out any third party liability problems. This responsibility only covers the construction work area. The Tribe should carry insurance to cover its normal actions which are not involved in the construction effort.

Construction Account

- a. A "Construction Account" entitled the _____ will be established as a separate checking account in the Tribe's name at a bank insured by the Federal Deposit Insurance Corporation.

The IHS will contribute to \$_____ to the Construction Account. These funds will be available to pay: (1) a percentage of local labor costs based on the HHS wage rates established for P.L. 86-121 projects for each of the separate trades involved plus taxes and insurance premiums; (2) Bookkeeping and accounting services; (3) supplies and materials to be approved in advance by the project engineer; (4) An administrative project support cost; and (5) other specialty contracts and contingencies as determined necessary by the project engineer.

- b. The Tribe must recognize that IHS's contribution of funds to the Construction Account generally will not be sufficient to cover all of the above cost items plus the full HHS wage rates for local labor. The Tribe has two options:

Option 1: The Tribe can provide additional funds from its own sources or sources other than IHS and pay its workers the full HHS wage rates plus pay the necessary taxes and insurance premiums, or,

Option 2: The Tribe may pay its workers less than the full HHS wage rates (usually in the range of 50 to 60 percent of the HHS wage rates) plus pay the necessary taxes and insurance premiums from that share of funds set aside in the Construction Account by the project engineer to cover the labor costs.

c. If the Tribe is unable to provide a labor force to meet the needs and skills which are necessary for completion of the project within the budget and time schedule as determined by the Project engineer, it may be necessary to hire labor from outside the Tribe. Any outside labor hired by the Tribe will be initially paid at the rates established for all local workers.

If at a future date, the Project Engineer and Tribal Project Administrator determine that it is necessary to authorize a higher rate, it may be done provided that this higher rate does not exceed the full P.L. 86-121 wage rate.

d. A CPA or CPA firm (will be/may be) hired and paid with funds from the Construction Account by the Tribe to: Issue paychecks bi-weekly to project employees; keep payroll records; complete quarterly and annual tax statements; make required deposits of withheld taxes; pay liability insurance, unemployment insurance, and workmen's compensation premiums; make payroll deductions; and provide regular statements on the account to the Tribe and the Project Engineer. It is further agreed by all parties that IHS, represented by its Project engineer, has the responsibility to assure that all payments made from the Construction account are justified and supported by appropriate documentation, records, invoices, etc. Furthermore, the IHS reserves the right to halt the project at any time if discrepancies involving the Construction Account funds arise until such time that the discrepancies are resolved to IHS's satisfaction. All payments from the Construction Account must be approved in advance by the IHS project engineer.

e. The IHS may also contribute additional sums to the Construction Account to permit the Tribe to the purchase materials, supplies, or services determined necessary for the project by the Project Engineer. Such purchases must be authorized in advance by the IHS project Engineer and be done in accordance with appropriate local regulations.

f. The Tribe will return to IHS any Construction Account funds not used for project labor or previously agreed upon materials, equipment, or services upon request by the Project Engineer. The Construction Account will be subject at any time to an audit by the Project Engineer and/or a CPA or CPA firm.

IHS Contributions and Obligations

The IHS, represented by its Project Engineer, Project Foreman, Employees, and Contractors, is responsible for designing, scheduling, selecting, purchasing materials and equipment, arranging for transportation, and constructing the sanitation facilities. All work will be done under the technical supervision of the IHS Project Engineer and Foreman.

A5. PROVISIONS FOR TRIBAL PROCUREMENTTribal Contributions Section

1. That the Tribe shall provide for construction through its procurement system of all water and sewage facilities described in the Project Summary; that the Tribe shall procure the facilities in accordance with this Agreement and in compliance with applicable Federal requirements.
2. That the Tribe shall submit to Indian Health Service for review and approval before advertising all proposed solicitations estimated to cost \$_____ or more; that the Tribe shall make such adjustments in the solicitation as determined necessary by IHS.
3. That the Tribe shall develop and submit to IHS for approval a proposed construction contract showing proposed unit costs, based on bids received, for construction of sanitation facilities to be installed. The Tribe shall negotiate these unit costs if necessary to receive approval from IHS. These unit costs shall govern for the duration of the Tribal contract under which they are proposed. No work shall be performed prior to written approval by IHS of the corresponding unit costs.
4. If additional or special units of work are needed for specific sites during execution of the project, the Tribe shall submit a list of proposed costs for negotiation on those items. Costs for the additional or special items shall then govern either for the duration of the Tribal contract, or for just those sites specified in the proposal, as agreed at the time. Major modifications to the construction contract (such as adding facilities not included in the Project Summary or requiring additional project funds) shall not be executed without written approval by the IHS Associate Director, Office of Environmental Health and Engineering, _____ Area.

IHS Contributions and Role Section

5. That the IHS shall review and approve (or reject with justification and explanation) proposed solicitations before advertising by the Tribe.
6. That the IHS shall review and approve proposed unit costs for all items of work under the project. Once approved by IHS, these unit costs shall govern all work for the duration of the Tribal contract under which they are proposed. Unit costs for additional or special units of work required at individual sites shall be negotiated before the IHS authorizes work for the site or group of sites affected. All unit costs are subject to approval by the Director, Sanitation Facilities Construction prior to the award of any contract or the start of any construction involving those items of work.
7. The IHS shall provide to the Tribe an amount not to exceed r \$_____ for administration and construction of the proposed facilities. The IHS Area Director may increase this amount subject to the availability of funds, and will notify the other parties in writing of any changes. The exact amount to be provided shall be the sum of the following items:
 - a. Actual cost of construction contracts;
 - b. Contract administrative support fee to be paid to the Tribe in lieu of indirect costs. This fee is to cover a portion of the cost of administering construction contracts under the project. The contract administrative support fee shall be as follows:

Contract Amount and Administrative Fee

\$0 to \$25,000:	Four percent of the contract amount.
\$25,000 to \$200,000:	\$1,000 plus three percent of the contract amount in excess of \$25,000.
Above \$200,000:	\$6,250 plus two percent of the contract amount in excess of \$200,000.

- c. Actual cost of construction of facilities by tribal force account, including labor, equipment, material, supplies, and services;
- d. Tribal force account support fee to be paid to the Tribe in lieu of indirect costs. This fee is to cover the cost of a portion of the salaries and benefits of those tribal employees associated with project (not program) administration. The tribal force account support fee shall be r _____ % of the tribal disbursements for force account labor; and
- e. Direct costs such as printing, copying, advertising, and accounting fees may be paid if approved in advance by the IHS Director, Division of Sanitation Facilities Construction.

8. The IHS contributions to the Tribe shall be made on a quarterly basis in amounts recommended for approval by the IHS District Engineer based on cost estimates for construction projected during the upcoming quarter. Supplemental requests for funds may be made should costs exceed the quarterly estimate. Any funds paid and not expended within a given quarter shall be applied toward the next quarterly estimate and the contribution adjusted accordingly.
9. The maximum expenditure for work under any Tribal contract shall not exceed the amount estimated in the Project Summary for that portion of facilities without an amendment to this Agreement.
10. At no time during the project will the Tribe represent the IHS nor will the IHS represent the Tribe in contract administration matters.
11. The IHS will, at the request of the Tribe, provide oversight and technical assistance on contractor submittals, progress payments, change order requests, and other project related information submitted by the tribal contractor and make recommendations to the Tribe.
12. The IHS shall utilize project funds in the amount of \$_____ for IHS project technical support expenses. Project technical support expenses shall include IHS expenditures for technician and clerical salaries, GSA vehicles, and miscellaneous project related expenses.
13. The IHS and Tribe shall inspect all sanitation facilities constructed through Tribal procurement to insure construction meets minimum IHS standards. The procurement documents shall also note that the IHS inspector does not have authority to modify the contract or issue direction to the contractor. Following construction inspection, the IHS will advise the Tribe on whether the construction meets the IHS interpretation of the contract requirements.

Procurement Standards

14. The Tribe shall use a system of contract administration that ensures performance by its contractors in accordance with the terms and conditions of the contract and in compliance with OMB Circular A-102 as adopted by HHS at 45 CFR 92. (See Appendix F of this Guideline) The Tribe shall be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurement. These issues include, but are not limited to source evaluation, protests, disputes, and claims.
15. No employee, officer or agent of the Tribe shall participate in the selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when: (a) the employee, officer, or agent, (b) any member of his immediate family, (c) his or her partner, (d) or an organization which employs, or is about to employ any of the above, has a financial or other interest in the firm selected for the award.
16. The tribal officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or potential contractors.

Competitive Procurement Practices

17. All tribal procurement under this Agreement shall be competitive and based on firm fixed prices unless approved by the Director, Division of Sanitation Facilities Construction, for reasons of public exigency, critical schedule constraints that could not have been anticipated, or essential equipment compatibility for operation and maintenance. The following requirements apply:
 - a. Materials, Construction, and Services (non A/E) Estimated at More than \$2,000 and Less than \$25,000: The Tribe shall solicit a written quote from a minimum of three (3) sources qualified to do the work and likely to submit a quote. The Tribe shall award a purchase order to the responsive, responsible source with the lowest quote.
 - b. Materials, Construction, and Services (non A/E) Estimated at \$25,000 or more: The Tribe shall advertise formally for a minimum of 15 calendar days for sealed bids to be opened publicly at a specified time, date, and place. The Tribe shall award a contract to the responsive, responsible source which has submitted the lowest bid price.
 - c. Architect/Engineer (A/E) Services: The Tribe shall solicit competitive proposals from potentially interested professional firms. A three-member selection board for the Tribe shall establish objective selection criteria before soliciting proposals. If IHS project funds are involved, at least one Registered Professional Engineer from IHS shall serve on the Board. The Tribe then shall select the firm determined by those criteria to be most qualified to perform the work. The Tribe shall attempt to negotiate with this firm to set fair and reasonable compensation. If negotiations with one firm are not successful, the Tribe may proceed to negotiate with the next most qualified firms. This process may continue until agreement is reached.

Indian Preference

18. If the Tribe has enacted an Indian preference ordinance of general applicability and agrees to apply the terms of that ordinance, the Indian preference requirements of that ordinance shall apply in lieu of IHS requirements as long as the effect is similar to that of IHS requirements. The Tribe may not give preference to tribal members or tribal companies only, nor limit preference geographically, including restriction to those within reservation boundaries.
19. In the absence of a formally adopted Indian preference policy by the Tribe, preference shall be given in the award of construction and service contracts to those firms (or joint ventures) whose levels of ownership and control by enrolled Indians (or Alaska Natives) each equal at least 51 percent of the total on a continuing basis for the duration of the contract. Firms (or joint ventures) which satisfactorily document at the time of bid or quotation such ownership and control shall have an equal to percent(‡) of their total bid deducted from the bid price for comparison with other bids. Once this deduction is made for qualified Indian firms (or joint ventures), the award will be made by the Tribe to the responsive, responsible bidder with the lowest resulting bid.

(‡)--This percentage shall be set jointly by IHS and the Tribe at a level within the range of 5 to 10 percent.

Required Notice to Prospective Bidders

20. The Tribe shall notify the vendors and contract bidders of the following:
- a. Indian Preference Policy for contracting/subcontracting.
 - b. Minimum percentage of work to be performed by the prime contractor (33 1/3%, unless otherwise specified).
 - c. Responsibility of the Tribe for compliance with and enforcement of the contract (i.e., the contract is not a Federal contract).
 - d. Restrictions on liens (state lien laws do not apply on Federal trust land).
 - e. Remedy for disputes, as provided for under General Provisions.
 - f. The role of the IHS.

Wage Rates

21. Davis-Bacon wage rates shall apply for all construction contracts exceeding \$2,000 in value executed by the Tribe and funded by Federal agencies, except for work funded with HUD CDGB funds²⁴. The Tribe is responsible for reviewing payroll information submitted by the contractor for compliance with Davis-Bacon requirements. (See Chapter 6, Section 2 and Appendix B, Schedule C of this Guideline) Unless it requests IHS to obtain wage rates, the Tribe shall request applicable wage rates directly from U.S. Department of Labor.

Bond Requirements

22. For construction contracts on Federal trust land exceeding \$100,000, the Tribe shall require bid, payment, and performance bonds, as described below. For construction contracts on non-trust land in excess of \$5,000, payment and performance bonds shall be required. The IHS may accept the bonding policy and requirements of the Tribe, provided that IHS determines that its interest is adequately protected. In lieu of such a determination, the minimum requirements shall be as follows:
- a. A bid guarantee from each bidder equivalent to five percent of the bid price.
 - b. A payment bond on the part of the contractor for 100 percent of the contract price.
 - c. A performance bond on the part of the contractor for 100 percent of the contract price.

Subcontract Limits

23. The prime contractor shall be required to perform with its employees and equipment at least 33.3 percent of the total amount of the work included in the contract. Copies of subcontract agreements may be required to verify the amount of work performed.

²⁴(Reference HUD statute and regulations at 42 U.S.C. 5307(e)(2); 24 CFR 1003.603)

Administrative Provisions

24. The Tribe's contract shall contain the following provisions:

- a. Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate (except small purchases).
- b. Termination for cause and for convenience by the Tribe including the manner by which it will be effected and the basis for settlement. (Contracts exceeding \$10,000).
- c. Compliance with the "Equal Employment Opportunity" Executive Order 11246 as amended. (Contracts and subcontracts exceeding \$10,000.)
- d. Compliance with the Copeland "Anti-kickback" Act.
- e. Compliance with the Davis-Bacon Act. (Contracts exceeding \$2,000).
- f. Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act. (Construction contracts in excess of \$2,000).
- g. IHS requirements for reporting, as called for in this Agreement.
- h. IHS Indian preference requirements.
- i. Access by the Federal government and the Tribe to any books, documents, papers, and records of the contractor which are directly pertinent to the specific contract for the purpose of making an audit, examination, excerpts, and transactions.
- j. Retention of all required records for three years after the Tribe makes final payment and all other pending matters are closed.
- k. Compliance with all applicable environmental laws and EPA regulations including Executive Order 11738. (Contracts exceeding \$100,000).

General Provisions

25. In the absence of an equivalent set of General Provisions approved by the Area SFC Division Director for construction contracts, Paragraph 1-43 of the General Provisions in Schedule B, Appendix B of this Guideline shall be included in their entirety in the Tribe's solicitation and contract. For procurement less than \$25,000, the Area SFC Division Director may approve a condensed set of these General Provisions that protects the IHS and Tribe's interests.

Special Provisions

26. Unless determined by the Area SFC Division Director to be inappropriate, the Tribe shall include in its solicitation and contract the Special Provisions shown as Schedule D, Appendix B of this Guideline.

Submittal Requirements

27. Unless determined by the Area SFC Division Director to be inappropriate, the Tribe shall include in its solicitation the submittal requirements shown as Schedule F, Appendix B of this Guideline.

Final Inspection

- 28. The Tribe shall conduct with the contractor, IHS representatives, and other interested parties, a final inspection of the facilities provided under the contract. Final acceptance and payment for the work by the Tribe shall not occur until the contractor has corrected all deficiencies identified at the final inspection and until the work is in full compliance with the plans, specifications, and other contract requirements.
- 29. Work will be inspected by IHS to insure that the work performed complies with all the terms and conditions of the Tribal contract. Final IHS contribution for the work performed will not be released to the Tribe until such time as the IHS participates in a final inspection and determines that the work complies with all contract requirements.

A6. PROVISIONS FOR TRIBAL FORCE ACCOUNT

General Provisions

1. The Tribe agrees to construct the proposed sanitation facilities, with its own construction employees, in accordance with plans and specifications prepared or approved by IHS.
2. The Tribe and IHS agree to work cooperatively to complete preconstruction planning activities including equipment, material and manpower needs, wage rates, qualifications necessary for the project superintendent, construction management, and the project schedule. The Tribe shall then complete a detailed construction cost estimate to demonstrate how the work will be performed within the project budget.
3. The Tribe and IHS acknowledge that project funding is limited to the amount shown in the Project Summary. If the Tribe's cost exceeds the estimate in the Project Summary, the scope of the project may need to be reduced. Cost overruns discovered near the end of the project, or after completion of the construction, may not get reimbursed due to a lack of funds. Any proposed change in the project scope or budget must be approved by IHS prior to implementation.
4. The construction shall be performed by the Tribe in accordance with plans and specifications prepared or approved by IHS. IHS is responsible for construction inspection, approval of materials, quality control testing and final acceptance of all work. Final payment to the Tribe shall not be approved until after IHS has conducted the final inspection and approved the work.
5. The Tribe agrees that, 1) all of their employees working on construction of the project shall be covered by applicable workmen's compensation insurance, 2) a general public liability and property damage insurance policy shall be in force throughout the construction period.
6. The Tribe agrees to demonstrate to the satisfaction of IHS that, a) adequate financial controls are in place to identify the source and disbursement of all funds, b) they will utilize a cost accounting system that will compare actual costs with budgeted amounts, c) accounting records will be supported by source documents, d) their procurement system complies with IHS requirements.
7. The Tribe may not receive a profit, in excess of allowable costs, as approved by IHS in accordance with the allowable cost provisions of OMB Circular A-87.
9. The Tribe is responsible for jobsite safety and for compliance with all applicable State and Federal health and safety requirements. The IHS Project Engineer may stop work if a safety problem is unresolved by the Tribe.
10. The Tribe is responsible for resolving all tort claims, contractual disputes, protests and claims resulting from their activities on this project.

Abbreviated Cost Control Provision:

11. The Tribe and IHS shall agree on unit prices for the work to be performed. After appropriate deductions for cash advances, IHS shall contribute funds to the Tribe for the quantity of work performed at the agreed upon unit prices, plus the project administrative support costs, if applicable.

Comprehensive Cost Control Provisions:

12. The Tribe will develop a projected cash flow and a construction budget to estimate costs for the work. IHS will contribute funds to the Tribe for their actual costs for the construction including the agreed upon administrative support fees.
13. The Tribe and IHS shall agree upon a cost control system to track project costs and accomplishments prior to construction. The Tribe shall provide to IHS, on a monthly basis, a financial and progress report showing: 1) a current accounting of all income, obligations and disbursements for labor, equipment, materials, administrative support costs, and budgeted amounts, 2) construction progress and a revised progress schedule if necessary.
14. If the Tribe experiences cost increases, above the amount estimated prior to construction, IHS will recommend corrective actions to reduce costs. Major cost overruns may require a revised scope of work, suspension of construction or other cost reduction initiatives.

A7. PROVISIONS FOR THIRD PARTY MOAs

Preamble

1. WHEREAS, the (Third Party) has expressed an interest in managing the administration and construction of the off-site facilities to be installed under this project; and

WHEREAS, the IHS is desirous of assisting the (Third Party), which is assisting the Tribe in the provision of sanitation facilities to serve Indian people, and

WHEREAS, the Tribe agrees that the (Third Party) shall perform the work, and

Contributions

2. That IHS will provide to the (Third Party) (\$___), ([all] materials, supplies, equipment, labor, tests, consultations, inspections necessary) for construction of the sanitation facilities in accordance with the attached Project Summary.

Transfer and Ownership

3. That all parties understand that the facilities constructed (including equipment, land, and supplies purchased) under this agreement with IHS funds are at no time the property of the IHS, but rather belong to the (Third Party), which shall operate and maintain such facilities properly, until or unless transferred to the Tribe or other parties.

Lead Agency

4. That the (Third Party) is the lead agency for this project; the requirements of (Third Party) shall govern the financial and procurement practices of the (Third Party, or, Tribe) in the provision of the sanitation facilities. [Note: Prior to executing the MOA, the IHS shall decide if it must address any Federal requirements; e.g., NEPA, historic preservation, etc.]

A8. Example RUS MOA

The project in the MOA example, PO-02-J47, was possible because the IHS and USDA-RUS executed a Memorandum of Understanding (MOU) outlining the procedures that the two agencies would use under various methods of project implementation, including tribal procurement. The IHS/USDA-RUS MOU contained provisions that should not or could not be inserted into the MOA.

Project PO-02-J47 was executed in this manner because both the Tribe and USDA-RUS requested that the IHS administer the project to address concerns about project administration and quality control. The previously executed the MOU on project implementation had prepared both agencies for execution of the project MOA allowing the Tribe to construct the project by tribal procurement. All payments were on a reimbursable basis.

After the MOA (funded by USDA-RUS dollars) was signed, and the contract package was 95% ready for bid solicitation:

1. IHS notified USDA and Tribe that it was prepared to begin bid solicitation (Letter No. 1) and requested that the loan closing documents be processed.
2. IHS/Tribe solicited bids.
3. IHS/Tribe evaluated bids and made a determination to award.
4. IHS requested USDA funds be sent to IHS (Letter No. 2, applies to both Tribal and IHS contracts).
5. The IHS contract was awarded, and the Tribal contract gets Unit Cost Approval after the USDA funds were contributed to IHS.
6. As work on the IHS/Tribal contract was completed and acceptable pay requests were received, funds were either paid to the contractor (IHS contracts) or were transferred to the Tribe as reimbursements (Tribal contracts).

For either IHS contracts or for Tribal contracts, the USDA funds are contributed to IHS after bids are opened and before award. Because of the short turn around, IHS asked that all loan documents anticipate the need for a quick turnaround, including authorization to close the loan before IHS or the Tribe begins bid advertisement.

The MOU only applies in the state of Washington. Oregon and Idaho elected not to execute umbrella MOUs; however, IHS uses the same basic project specific MOA in both states.

A8. Example RUS MOA

MEMORANDUM OF AGREEMENT
AMONG
INDIAN HEALTH SERVICE,
THE DEPARTMENT OF AGRICULTURE RURAL UTILITIES SERVICE
AND
THE SAUK-SUIATTLE INDIAN TRIBE
OF THE
SAUK-SUIATTLE INDIAN RESERVATION
WASHINGTON

PUBLIC LAW 86-121
PROJECT PO-02-J47

This Agreement is made among the Indian Health Service, hereinafter called IHS, acting through the Director, Portland Area Indian Health Service, U.S. Department of Health and Human Services, under and pursuant to the provisions of Public Law 86-121 (73 Stat. 267); the U.S. Department of Agriculture, Rural Utilities Service hereinafter referred to as USDA-RUS, acting through the Program Director, Rural Utilities Service, of the Washington State Office; and the Sauk-Suiattle Indian Tribe of the Sauk-Suiattle Indian Reservation, hereinafter called the Tribe, acting through the Chairperson of the Tribal Council.

WHEREAS, the Tribe desires to construct improvements to the Sauk-Suiattle community water and sewer systems for the homes and offices located on the Sauk-Suiattle Indian Reservation; and

WHEREAS, the Tribe has requested IHS assistance with the construction of improvements to the Sauk-Suiattle community water and sewer systems; and,

WHEREAS, IHS desires to assist in the construction of improvements to the community water and sewer systems on the Sauk-Suiattle Indian Reservation; and,

WHEREAS, the Tribe has submitted an application for financial assistance to USDA-RUS for financial assistance in constructing improvements to the Sauk-Suiattle community water and sewer systems; and,

WHEREAS, the Tribe has received a preliminary indication that the application is eligible for approval; and

WHEREAS, the Tribe and USDA-RUS desires IHS to manage the project to assist in quality control; and

WHEREAS, the framework for the IHS and USDA-RUS partnership was established in the attached Memorandum of Understanding entitled "MEMORANDUM OF UNDERSTANDING BETWEEN UNITED STATES DEPARTMENT OF AGRICULTURE, WASHINGTON STATE RURAL UTILITIES SERVICE AND UNITED STATES INDIAN HEALTH SERVICE."

NOW THEREFORE, in order to carry out the project as set forth in the attached Project Summary/Preliminary Engineering Report entitled " PROJECT SUMMARY/PRELIMINARY ENGINEERING REPORT, COMMUNITY WATER SUPPLY AND WASTE DISPOSAL FACILITIES, FOR THE SAUK-SUIATTLE INDIAN TRIBE, SAUK-SUIATTLE INDIAN RESERVATION, WASHINGTON, PL-86-121, IHS PROJECT NO. PO-02-J47, NOVEMBER 2001," the parties mutually agree:

TRIBAL CONTRIBUTIONS

1. That the Tribe shall provide a representative to coordinate participation under this project.
2. That for all facilities constructed by the Tribe, the Tribe shall contribute "in-kind" legal, administrative, and contracting services valued at \$32,200.00 as described in the Project Summary/Preliminary Engineering Report.
3. That the Tribe shall enter into an agreement with USDA-RUS for financial assistance in the amount of \$644,000.00 to be applied towards the eligible costs of the facilities described in the Project Summary/Preliminary Engineering Report. That this agreement shall include provisions for execution of loan closing.

4. That the Tribe agrees that the USDA-RUS may close the loan prior to bid solicitation by the Tribe.
5. That the Tribe agrees that the USDA-RUS funds may be advanced to IHS upon receipt by USDA-RUS of a written request from IHS supported by a valid unit cost proposal.
6. That the Tribe shall provide all materials, supplies, equipment, and labor to construct all facilities as described in the Project Summary/Preliminary Engineering Report.
7. That for all the work performed by the Tribe, the Tribe shall obtain from the contractor(s), suppliers and manufacturers on equipment, work, and supplies provided by them to the extent feasible a one-year warranty from the date of completion and approval of contribution by IHS. Under this warranty, the contractor will be obligated to repair or replace, as necessary, at no cost to the IHS nor the Tribe, any system or components that fail during that first one-year period.
8. That for the facilities to be constructed by the Tribe, the Tribe shall provide for construction through its procurement system of all water and sewer system improvements described in the Project Summary/Preliminary Engineering Report, that the Tribe shall procure the materials and completed facilities in accordance with this Agreement and with the requirements of Addendum A, entitled "Requirements for Tribal Procurement of Sanitation facilities under P.L. 86-121."
9. That the Tribe shall carry out its responsibilities under the project in accordance with the requirements of Addendum B, entitled "Requirements for Fund Control, Allowable Costs, Records and Property under P.L. 86-121 MOA."

PERMISSION TO ENTER TRIBAL LANDS AND RIGHTS-OF-WAY

10. That the Tribe hereby grants permission to USDA-RUS and IHS and their representatives to enter upon or cross lands of the Sauk-Suiattle Indian Reservation to carry out this project as outlined in the attached Project Summary/Preliminary Engineering Report and as provided for in this Agreement, and further agrees to waive all claims which may arise by reason of entry upon such lands, except those which qualify under the Federal Tort Claims Act.
11. That the Tribe shall provide, at no cost to IHS, all required lands, easements, and rights-of-way necessary over lands controlled by the Tribe for construction of community water and sewer system improvements and appurtenances as described in the attached Project Summary/Preliminary Engineering Report. All interests in such lands, easements, and rights-of-way shall remain with the Tribe, except as otherwise provided for in this Agreement.

CONSTRUCTION COSTS

12. That the Tribe shall develop and submit to IHS for approval by the Director, Division of Sanitation Facilities Construction, Portland Area IHS (DSFC), a schedule of proposed unit costs for construction of sanitation facilities to be installed by the Tribe. The Tribe shall negotiate these unit costs if necessary to receive approval by the Director, DSFC. These unit costs shall govern for the duration of this project. No work shall be performed prior to written approval by IHS of the corresponding unit costs.
13. If other special units of work are needed during execution of the project, the Tribe shall submit a list of proposed costs for negotiation on those items. Costs for the special items then shall govern either for the duration of the project, or for just those sites specified in the proposal, as agreed at the time.
14. That IHS shall review and negotiate proposed unit costs for all items of work under the project. Once accepted by IHS, these unit costs shall govern all Tribal work for the duration of the project. Unit costs for special items of work shall be negotiated before IHS authorizes work. All unit costs are subject to approval by the Director, DSFC.

INDIAN HEALTH SERVICE CONTRIBUTIONS

15. That IHS shall designate a Project Engineer to manage the Project on behalf of the Tribe, as described in this Agreement and the attached Project Summary/Preliminary Engineering Report.
16. That for all facilities constructed by the Tribe, IHS shall provide, without charge to the Tribe, engineering design, plans, specifications, site drawing, and advisory construction inspection services, as described in the Project Summary/Preliminary Engineering Report. Advisory construction services for

contracts procured by the Tribe shall be provided as technical assistance to review compliance with minimum IHS standards.

17. That the IHS shall submit plans and specifications for the proposed water and sewer facilities improvements to the Tribe, and USDA-RUS for review and comment prior to construction.

18. That IHS shall provide final approved construction documents, including plans and specifications, to the Tribe prior to bid advertisement upon notification from USDA-RUS that the loan closing documents have been executed.

19. That IHS approval of the Tribe's unit cost proposal shall be contingent upon receipt of USDA-RUS funds by IHS as provided in Paragraph 24 of this Agreement.

20. That for approved work completed by the Tribe and upon receipt of the Tribe's request for contribution, IHS contribute to the Tribe funds in an amount not exceed \$587,687.81 without an amendment to this Agreement. The contribution(s) shall be made on the following terms:

- a. That for each work item for which a contribution is requested, construction of all approved facilities has been completed and the Indian Health Service has determined the work to be in compliance with the approved plans and specifications.
- b. That the Tribe has submitted a signed "Request for Contribution" listing the work items completed, the cost for each work item at the approved cost times the quantity of item completed, the amount of the requested current contribution, the grand total cost of work completed to date, and the total of contributions approved through the previous request.
- c. That the Tribe has submitted acceptable as-built drawings and required test results and samples for which a contribution is requested. IHS will not authorize payment until 100% of the required data is provided.

21. That the amount(s) of contribution(s) calculated in the attached Project Summary or any subsequent amendments may include an additional project support fee of 2 percent of the cost of procured services for administering contracts under the project, subject to the ceiling in Paragraph No. 20 for total contribution(s).

22. That IHS shall provide instructions on the proper utilization, maintenance, operation and protection of facilities provided.

DEPARTMENT OF AGRICULTURE RURAL UTILITIES SERVICE

23. That USDA-RUS shall provide a representative to coordinate participation under this Project.

24. That USDA-RUS shall advance funds to IHS in the amount of \$644,000.00 for the USDA-RUS portion of the costs of the project upon receipt of a written request from IHS supported by a valid unit cost approval. USDA-RUS shall advance USDA-RUS funds to IHS within 10 days of receipt of the IHS request.

FINAL INSPECTION

25. That representatives from the Tribe, USDA-RUS and IHS shall conduct a joint final inspection of the community water system improvements to determine that such facilities were constructed in an acceptable manner.

SPECIAL PROVISIONS FOR PROJECT FUNDING

26. That if actual costs of providing the improvements to the community water and sewer systems are less than the total amount of funds provided under this project, then surplus funds will be returned to USDA-RUS, unless the parties mutually agree otherwise. Alternatively, if the projected cost of improvements to the community water and sewer systems exceeds the total funds provided by the USDA-RUS, then IHS and the Tribe will notify USDA-RUS immediately. The Tribe will perform no additional work beyond the amount of funds available until the parties have provided additional funds. Any additional contribution requested of any party shall be subject to the availability of funding and prior approval.

TRANSFER AND OWNERSHIP OF FACILITIES

27. Facilities constructed by the Tribe under this Agreement at no time are the property of IHS but rather belong to the Tribe until and unless transferred to other parties.

28. That because the IHS will not at any time own the sanitation facilities constructed by the Tribe, no formal transfer agreement will be necessary for these facilities. In lieu of the transfer agreement, the IHS will notify the Tribe when IHS participation in the project is complete.

29. That IHS shall provide to the Tribe copies of as-built drawings for all sanitation facilities constructed by Tribe under this project.

PROJECT TECHNICAL SUPPORT

30. That from the total amount of funds made available to this project, an amount up to 10%, will be deducted by IHS to fund the Project Technical Support Account; that this account shall be used to cover technical support costs such as technician's wages, travel and other support costs; clerical support; testing, printing, and other indirect technical support costs associated with the planning, design and construction of IHS sanitation facilities projects.

TERMS OF AGREEMENT

31. That this Agreement shall take effect upon:

- a. Approval by all parties, and.
- b. Execution of the loan closing documents by the Tribe and USDA-RUS in accordance with Paragraph 4 of this Agreement.

32. That this Agreement shall remain in effect at least until the earlier of the following dates:

- a. The date when all terms of this Agreement have been met, or
- b. December 31, 2003.

33. That the parties reserves the right to withdraw from this Agreement at any time after the date set forth in Paragraph No. 32b. If this agreement is ended prior to completion of construction of the sanitation facilities, then all such facilities partially or fully completed at that time shall become the property of the Tribe.

CONCURRENCE WITH PROJECT SUMMARY/PRELIMINARY ENGINEERING REPORT

34. That each party to the Agreement has received and concurs with the Project Summary/Preliminary Engineering Report for Project PO-02-J47 upon which this Agreement is based.

IN WITNESS TO THE TERMS OF THIS AGREEMENT, the parties have subscribed their names.
FOR THE SAUK-SUIATTLE INDIAN TRIBE:

Date	Chairperson, Sauk-Suiattle Indian Tribe, having been duly authorized to enter into this Agreement on behalf of the Sauk-Suiattle Indian Tribe, as evidenced by the attached Resolution made by the Council.
	FOR THE DEPARTMENT OF AGRICULTURE RURAL UTILITIES SERVICE:
Date	Program Director, Rural Utilities Service U.S. Department of Agriculture, Rural Development
	FOR THE INDIAN HEALTH SERVICE:
Date	Director, Portland Indian Health Service U.S. Department of Health and Human Services

ADDENDUM A to MOA, PO-02-J47REQUIREMENTS FOR TRIBAL PROCUREMENT OF SANITATION FACILITIES, INCLUDING MATERIALS, CONSTRUCTION, AND SERVICES UNDER P.L. 86-121 MOA.A. PROCUREMENT STANDARDS:

The Tribe shall use a system of contract administration that ensures performance by its contractors in accordance with the terms and conditions of the contract and compliance with OMB Circular A-102 (45CFR92). The Tribe shall be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurement. These issues include, but are not limited to source evaluation, protests, disputes, and claims.

No employee, officer or agent of the Tribe shall participate in the selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when: (a) the employee, officer, or agent, (b) any member of his immediate family, (c) his or her partner, (d) or an organization which employees, or is about to employ, any of the above, has a financial or other interest in the firm selected for the award.

The tribal officers, employees, or agents will neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or potential contractors.

B. COMPETITIVE PROCUREMENT PRACTICES:

1. Competition - All tribal procurement under the MOA shall be competitive and based on firm fixed prices. The following requirements apply:
 - a) Materials, Construction and Services (non A/E) Estimated at Less than \$2,000: The Tribe shall solicit a verbal or written quote from one or more source qualified to do the work. The Tribe shall award a purchase order to the qualified source with the lowest quote.
 - b) Materials, Construction and Services (non A/E) Estimated at More than \$2,000 and Less than \$100,000: The Tribe shall solicit a written quote from a minimum of three (3) sources qualified to do the work and likely to submit a quote. The Tribe shall award a purchase order to the responsive, responsible source with the lowest quote.
 - c) Materials, Construction and Services (non A/E) Estimated at \$100,000 or more: The Tribe shall advertise formally for a minimum of 15 calendar days for sealed bids to be opened publicly at a specified time, date, and place. The Tribe shall award a contract to the responsive, responsible source which has submitted the lowest bid price.
 - d) Architect/Engineer (A/E) Services: The Tribe shall solicit competitive proposals from potentially interested professional firms. The Tribe shall establish objective selection criteria before soliciting proposals. The Tribe then shall select the firm determined by selection criteria to be most qualified to perform the work. The Tribe shall attempt to negotiate with this firm to set fair and reasonable compensation. If negotiations with one firm are not successful, the Tribe may proceed to negotiate with the next most qualified firm. This process may continue until agreement is reached.
2. Indian Preference: If the Tribe has enacted an Indian preference ordinance of general applicability and agrees to apply the terms of that ordinance, the Indian preference requirements of that ordinance shall apply in lieu of IHS requirements as long as the effect is similar to that of IHS requirements. The Tribe may not give preference to tribal members or tribal companies only, nor limit preference geographically, including restriction to those within reservation boundaries.

In the absence of a formally adopted Indian preference policy by the Tribe, preference shall be given in the award of construction and service contracts to

those firms (or joint ventures) whose levels of ownership and control by enrolled Indians (or Alaska Natives) each equal at least 51 percent of the total on a continuing basis for the duration of the contract. Firms (or joint ventures) which satisfactorily document at the time of bid or quotation such ownership and control shall have an amount equal to 5 percent of their total bid deducted from the bid price for comparison with other bids. Once this deduction is made for qualified Indian firms (or joint ventures), the award will be made by the Tribe to the responsive, responsible bidder with the lowest resulting bid.

C. REQUIRED NOTICE TO PROSPECTIVE BIDDERS:

The Tribe shall notify the vendors and contract bidders of the following:

- a) Indian Preference policy for contracting/subcontracting.
- b) Minimum percentage of work to be performed by the prime contractor (33-1/3%, unless otherwise specified).
- c) Responsibility of the Tribe for compliance with and enforcement of the contract (i.e., the contract is not a Federal contract).
- d) Restrictions on liens (State lien laws do not apply on Federal trust land).
- e) Remedy for disputes, as provided for under General Provisions (Schedule B in the Appendix).
- f) The role of the IHS, such as technical advisor and construction inspector for the Tribe.

D. WAGE RATES:

Davis-Bacon wage rates shall apply for all construction contracts exceeding \$2,000 in value executed by a Tribe and funded by Federal agencies, except for work funded with HUD CDBG funds. The Tribe is responsible to review payroll information submitted by the contractor for compliance with Davis-Bacon requirements, in accordance with attached Labor Provisions (Schedule C in the Appendix).

Unless it requests IHS to obtain wage rates, the Tribe shall request applicable wage rates directly from U.S. Department of Labor.

E. BONDING REQUIREMENTS:

For construction contracts on Federal Trust Land exceeding \$100,000, the Tribe shall require bid, payment, and performance bonds, as described below. For construction contracts on non-trust land in excess of \$5,000, payment and performance bonds shall be required. The IHS may accept the bonding policy and requirements of the Tribe, provided that IHS determines that its interest is adequately protected. In lieu of such a determination, the minimum requirements shall be as follows:

- (1) A bid guarantee from each bidder equivalent to five percent of the bid price.
- (2) A payment bond on the part of the contractor for 100 percent of the contract price.
- (3) A performance bond on the part of the contractor for 100 percent of the contract price.

F. SUBCONTRACT LIMITS:

The prime contractor shall be required to perform with its employees and equipment at least 33.3 percent of the total amount of the work included in the contract. Copies of subcontract agreements may be required to verify the amount of work performed.

G. ADMINISTRATIVE PROVISIONS:

The Tribe's contract shall contain the following provisions:

- a) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate (except small purchases).
- b) Termination for cause and for convenience by the Tribe including the manner by which it will be effected and the basis for settlement. (Contracts exceeding \$10,000.)
- c) Compliance with the "Equal Employment Opportunity" Executive Order 11246 as amended: (Contracts and subcontracts exceeding \$10,000.)
- d) Compliance with the Copeland "Anti-kickback" Act.
- e) Compliance with the Davis-Bacon Act. (Contracts exceeding \$2,000.)
- f) Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standard Act. (Construction contracts in excess of \$2,000.)
- g) IHS requirements for reporting, as called for in the MOA.
- h) IHS Indian preference requirements.
- I) Access by the Federal government and the Tribe to any books, documents, papers, and records of the contractor which are directly pertinent to the specific contract for the purpose of making an audit, examination, excerpts, and transactions.
- j) Retention of all required records for three years after the Tribe makes final payment and all other pending matters are closed.
- k) Compliance with all applicable environmental laws and EPA regulations including Executive Order 11738. (Contracts exceeding \$100,000.)

H. GENERAL PROVISIONS:

In the absence of an equivalent set of General Provisions approved by the Area SFC Branch Chief for Construction contracts, Paragraph 1-43 of the General Provisions appearing as Schedule B in the Appendix shall be included in their entirety in the Tribe's solicitation and contract. For Procurement less than \$100,000, the Area SFC Division Director may approve a condensed set of these General Provisions that protects the IHS and Tribe's interests.

I. SPECIAL PROVISIONS:

Unless determined by the Area SFC Division Director to be inappropriate, the Tribe shall include in its solicitation and contract the Special Provisions shown as Schedule D in the Appendix.

J. SUBMITTAL REQUIREMENTS:

Unless determined by the Area SFC Division Director to be inappropriate, the Tribe shall include in its solicitation the submittal requirements shown as Schedule F in the Appendix.

K. FINAL INSPECTION:

The Tribe shall conduct with the contractor, IHS representatives, and other interested parties, a final inspection of the facilities provided under the contract. Final acceptance and payment for the work by the Tribe shall not occur until the contractor has corrected all deficiencies identified at the final inspection and until the work is in full compliance with the plans, specifications, and other contract requirements.

Work will be inspected by IHS to insure that the work performed complies with all the terms and conditions of the Tribal contract. Final IHS contribution for the work performed will not be released to the Tribe until such time as the IHS participates in a final inspection and determines that the work complies with all contract requirements.

ADDENDUM B to MOA, PO-02-J47REQUIREMENTS FOR FUND CONTROL, ALLOWABLE COSTS, RECORDS, AND PROPERTY UNDER P.L. 86-121 MOA.A. PROJECT FUND CONTROL1. Tribal Financial Management Standards

The Tribe shall provide the following features in its financial management system:

a) Financial Report: The Tribe shall disclose accurate, current, and complete financial results of the project in accordance with the financial reporting requirements of the MOA.

b) Accounting Records: The Tribes shall maintain records which adequately identify the source and application of funds provided.

c) Internal Controls: The Tribe shall maintain effective control and accountability for all cash, real and personal property, and other assets acquired.

d) Budget Control: The Tribe shall compare actual expenditures with budgeted amounts for the project.

e) Allowable Costs: Applicable OMB cost principles (OMB Circular A-87) and the terms of the MOA shall govern in determining the reasonableness, allowability, and allocability of all costs under the project.

f) Source Documentation: The Tribe shall support its accounting records with source documents such as cancelled checks, paid bills, payrolls, time and attendance records, and contract documents.

2. IHS Contributions under the MOA

a) Contributions: Proposed contributions to the Tribe from IHS and other funds shall be as provided for in the MOA. The purpose, timing, maximum amount, and procedure for approving and disbursing contributions shall be spelled out in the MOA.

b) Financial Account: The Tribe shall maintain a separate financial account for the project.

c) Cash Flow Schedule: The Tribe shall submit a projected cash flow schedule. The Tribe and IHS shall minimize the time elapsed between fund transfer and disbursement.

d) Advances: The IHS may provide a contribution to the Tribe in advance of construction to purchase or rent equipment and materials to prepare for construction. This initial advance may be an amount up to 25 percent of the Tribal project budget. Upon initiation of construction, the Tribe may request additional funds consistent with the pre-approved project budget, work accomplished, and cash flow schedule. Advances proposed in the cash flow schedule shall be tied to anticipated expenditures during the next time interval, and the advance will be made as close as possible to the time the funds are to be expended. Before issuing subsequent advances, IHS shall compare previous advances versus actual expenditures by the Tribe. Based on this information, adjustments may be made in the cash flow schedule. Interest in excess of \$100 per year earned on advances must be returned to the IHS.

e) Unexpended Funds: The Tribe shall return unexpended funds within 30 days after the completion of the project construction phase.

f) Prohibited Practices: Funds for construction projects under an MOA shall not be borrowed or intentionally invested. Funds from one IHS funded

construction project shall not be used for cash flow or other unauthorized purposes for on other projects.

3. Allowable Costs

OMB Circular A-87 (see Exhibit 1 in the Appendix) shall govern the determination of all allowable costs under the project, except as spelled out in the MOA, including special requirements for non-Federal funds. Some examples of expenses that are not allowed to be charged to the project include bad debts, some consultant fees, fees for some types of legal work, bonus payments to contractors, damage judgment suits, fund-raising expenses, entertainment, interest, and fines and penalties, including parking tickets. See Exhibit 1 for a further explanation.

a) Administrative Project Support Fees: Administrative project support fees may be paid to the Tribe in lieu of indirect costs (which typically are paid for program administration). The Administrative project support fee is intended to cover the cost of a portion of the salaries and benefits of those tribal employees associated with project administration. Such fees shall be established jointly by the Tribe and IHS to reflect anticipated costs under a given MOA. In the absence of data to support different fees, the following sliding scale shall be used for tribal construction and supply contracts.

Amount	Admin. Project Support Fee, Not to Exceed:
\$0 to \$25,000	4 percent of total
\$25,000 to \$200,000	3 percent of total
above \$200,000	2 percent of total

Examples - The fees for projects of various sizes would be:

Size	Fee
\$ 20,000 x 4% =	\$ 800
\$100,000 x 3% =	\$3,000
\$300,000 x 2% =	\$6,000

For force account work performed by the Tribe, the administrative fee shall be paid to the Tribe in proportion to tribal disbursements for force account labor. A maximum amount for administrative support shall be 10 percent of the labor disbursement amount. This amount shall be reduced proportionately on projects which have the planning and administrative functions performed by the IHS or other parties.

b) Direct costs such as printing, copying, advertising, and accounting fees may be paid in addition, if approved in advance by the Director, Division of Sanitation Facilities Construction.

c) Budget Changes: Any proposed changes by the Tribe in the project scope and/or budgeted costs must be reviewed and approved by IHS as provided for in the MOA.

4. Audits and Reports

a) Audits: The Tribe shall be subject to audit in accordance with the requirements of the Single Agency Audit Act (OMB A-102,P). The IHS shall have access to all tribal project records, and the IHS Area Director may at any time request a project audit, as necessary.

b) Financial Reporting: If financial reports are required by IHS, the frequency shall not exceed once per quarter. Financial reports are separate from cost accounting and progress reports for project construction, which will be required monthly. Financial reports may only include those items described in 45CFR92.41.

c) Project Closeout Requirements: The IHS will closeout the project when it determines that all applicable administrative actions and all required project work has been completed. The Tribe shall submit a closeout financial report after completion of the project and return of all unused funds.

B. PROJECT RECORDS AND PROPERTY MANAGEMENT

1. Retention of and Access to Records

Except as otherwise provided, project records shall be retained for three years from the project completion date. These records include all financial records, supporting documents, procurement documents, including but not limited to: time sheets, cancelled checks, invoices, purchase orders, and contracts. The Tribe shall make these records available upon request by the IHS, Inspector General, or their designated representatives.

If any litigation, claim, negotiation, audit, or other action involving the records has been started before the expiration of the 3-year period, the records shall be retained until completion of the action and resolution of all issues which arise from it, or until the end of the 3-year period, whichever is later.

2. Equipment

Title to equipment acquired by the Tribe for its exclusive use under a project vests with the Tribe upon acquisition. The Tribe shall maintain property records for such equipment acquired. The ownership and use of equipment shall be as provided in the MOA.

If IHS provides Federally-owned equipment to the Tribe for use on the project, the title shall remain with the Federal Government unless otherwise officially transferred. The Tribe shall maintain and manage the equipment in accordance with IHS rules and the applicable use permit or agreement.

3. Real Property

Title to real property acquired by the Tribe under the project vests in the Tribe upon acquisition. In the case of sanitation facilities or related improvements to real property, ownership vests in the Tribe upon installation by the Tribe and upon acceptance by the Tribe of facilities constructed by it contractor(s) on tribal lands.

4. Supplies and Materials

Title to supplies to be consumed during the project vests in the Tribe upon acquisition by the Tribe. Title to materials to be incorporated into sanitation facilities or into other related improvements to real property under the project vests with the Tribe upon acquisition.

If at the end of a project, residual supplies or materials worth more than \$100 in total value remain, the disposition of such supplies or materials shall be as prescribed in the transfer agreement.

PROJECT SUMMARY/PRELIMINARY ENGINEERING REPORT
COMMUNITY WATER SUPPLY AND WASTE DISPOSAL FACILITIES
FOR THE
SAUK-SUIATTLE INDIAN TRIBE
SAUK-SUIATTLE INDIAN RESERVATION
WASHINGTON

PL-86-121
IHS PROJECT NO. PO-02-J47
NOVEMBER 2001

I. Synopsis

This project recommends that the Indian Health Service (IHS) assist the Sauk-Suiattle Indian Tribe in constructing improvements to the Tribe's community water and sewer systems on the Sauk-Suiattle Indian Reservation, located near Darrington, Washington. The community water system improvements consist of a new community water well, abandonment of an existing well, a new control system installed in the existing pumphouse, construction of a new water storage tank, and abandonment of the existing concrete tank. The community sewage system improvements include installation of five aerobic treatment systems with low-pressure drainfields to replace the existing communal septic systems.

The facilities proposed under this project will be constructed on the Sauk-Suiattle Indian Reservation. The Indian Health Service and the Tribe will obtain any necessary permits. The IHS will provide all engineering, design, construction plans and specifications and advisory construction inspection services. The Tribe will construct the facilities through Tribal Procurement methods.

The U. S. Department of Agriculture-Rural Utilities Service (USDA-RUS) will fund \$644,000.00 through a grant/loan agreement with the Tribe. IHS will provide "in-kind" engineering and project management services valued at \$54,740.00 (8.5%). The Tribe will contribute legal, administrative, and contracting "in-kind" services valued at \$32,200.00 (5%). Therefore, total "in-kind" contributions amount to \$86,940.00, with a total project cost of \$730,940.00.

II. Background Information

The Sauk-Suiattle Indian Reservation is located in south central Skagit County in western Washington. It is bordered on the east by the Sauk River, on the west by state highway 530 and on the north and south by farmland and wilderness. The 25-acre Reservation was created in 1980 through a conversion of fee to trust land. The Reservation is surrounded by mountains, which are heavily forested. The climate is mild and wet.

The elevation of the area is approximately 800 feet above mean sea level. The average temperature range is 28 degrees Fahrenheit (minimum) to 76 degrees Fahrenheit (maximum); the annual precipitation averages 75 to 80 inches.

The total population of the Tribe is approximately 243 people with 50 members living on site in a 25-acre, 20-unit subdivision.

In January of 2001, IHS completed an engineering study of the Sauk-Suiattle community water and wastewater systems. The study consisted of inspection and evaluation of the water system including the water storage reservoir, water wells, pump house, gate valves, fire hydrants, individual water meters, and water mains. The study identified deficiencies in the water system that included the following:

- | | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ol style="list-style-type: none"> 1. Damaged or missing water meters. 2. Community well within 100' of existing drainfield. 3. Inadequate wellhead protection. 4. Excessive leaking in community concrete water storage reservoir. 5. Inadequate system pressure (static | <ol style="list-style-type: none"> 6. and dynamic). 6. Inadequate fire flow storage in tank. 7. Existing community well threatened by encroaching Sauk River. |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

The existing identified deficiencies do not constitute any imminent health threats. However, the potential exists for several avenues of contamination to the groundwater, which provides drinking water for the community. The other deficiencies are also significant, resulting in O&M difficulties, aesthetic concerns, and lack of fire protection.

Deficiencies in the wastewater facilities were also identified in the study; these are identified in the following list:

- | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ol style="list-style-type: none"> 1. Existing septic tanks are over 20 years old, and are likely unable to prevent infiltration from groundwater or exfiltration into the environment. 2. Inadequate vertical separation exists between the drainfields and the seasonal high groundwater table, resulting in contamination to the groundwater during the rainy season. 3. Proximity of some drainfields to | <p>the encroaching Sauk River poses a risk of exposure, pollution to the river, and subsequent loss of service of the drainfields.</p> <ol style="list-style-type: none"> 4. Likely pollution of the groundwater coupled with proximity to the community wells poses a risk of contamination to the Tribe's water system. |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

These deficiencies are of a serious nature, and although no contamination has yet been identified, the risk is clearly present. Contamination to the Tribe's drinking water poses a particularly dangerous risk, as no alternative water supply sources exist in the extremely limited property available to the Tribe for development.

III. Existing Facilities

Water

The Sauk-Suiattle community water system consists of two wells. A summary of the wells follows.

Well	Year Built	Casing Size	Depth	Static Level	Flow	Pump/Motor Size
1	1981	6 inch	51 feet	9 feet	35 gpm	1-½ Hp
2	1983	8 inch	58 feet	20 feet	45 gpm	2 Hp

Well #1 and #2 operate alternately to provide for all the water demands in the community. Raw water is pumped through the pumphouse, where it is treated with sodium hypochlorite and fluoride which are injected into the system by chemical feed pumps. Community usage averages 400,000 gallons-per-month or 13,300 gallons per day (gpd). Peak water use has reached 15,000 gpd in the summer. Winter water use reduces to an average of 9,000 gpd.

The Sauk-Suiattle community water system contains one water storage reservoir. A summary of the reservoir follows.

Reservoir	Year Built	Type	Material	Capacity	Condition
1	1982	20' X 60' Standpipe	Concrete	141,000 gallons	Marginal

The concrete reservoir is the only storage reservoir for the entire community. For the past several years, it has experienced leakage through the walls and insufficient system pressure. The external leakage is believed to be the result of corrosive water (pH ~6.2). The pH of the water will shortly be raised to a more neutral level with soda ash chemical treatment equipment being installed with funding from the EPA under IHS Project PO-01-J17. In 1996 under IHS Project PO 95-866, the tank leakage problem was addressed by installing a coating on the interior surfaces, using an epoxy primer and a urethane elastomer topcoat. Despite these efforts, leaks redeveloped after two years and continue to be observed on the outside of the tank at present. Although the tank is fully functional, uncertainties exist regarding the structural integrity, and the functional service life of the tank is unknown.

The Sauk-Suiattle Tribe owns and operates the community water system. The Tribe has the appropriate resources to assume the O&M responsibilities for the water system improvements proposed by this project. The cost estimate for this project does not include any additional equipment and training to the Tribal Water & Sewer Department because the recommended water system improvements will not significantly increase the O&M time and cost requirements and responsibilities for the Tribe.

Sewer

Wastewater from the homes and community buildings on the Reservation is treated and disposed of by conventional septic tank and communal drainfield systems. There are four communal drainfields, disposing of collected effluent from three to eight homes each. These drainfields are located behind the homes, just inside the outside perimeter of the housing area.

The septic systems were constructed in 1981 when the homes were built, and since this time, no modifications have been made to these systems. Although these septic tanks have reportedly been periodically pumped, there is no record of a routine pumping schedule, posing the concern that solids may have overflowed to the drainfields. Currently, there is no evidence of failure in the drainfields; however, there have been occasional complaints from several homeowners of excessive ponding water over the drainfields. The source of the ponding water has yet to be confirmed as originating from a drainfield.

The soils in the area are relatively coarse, and have provided satisfactory drainage. The subsurface flow is fed by drainage from the nearby mountains. The valley is relatively narrow, and is subject to rapid changes in groundwater levels during peak runoff times of

the year. In addition, the groundwater moves quickly to the nearby river, where it could easily contaminate this surface source. Test pits have shown the water table to exist in the range of two to six feet below the ground surface. Furthermore, the presence of certain types of grasses nearby (Reed Canary), suggest the likelihood of wetlands in these areas, which could impact adjacent drainfield performance.

Washington State standards for conventional onsite septic systems mandate that at least three feet of vertical separation must exist between the drainfield floor elevation and the seasonal high water table or a confining layer. During the winter months, this standard is violated. During the wet seasons (fall, winter, spring), the water table is high enough that final treatment by unsaturated soil is not occurring. Therefore, conventional septic tank/drainfields in this community are likely polluting the groundwater table during high water table periods of the wet season. The proximity of some of these drainfields (within 100' from community wells) has already been addressed in this report.

The presence of individual septic tanks on shared drainfields presents more potential problems. If a septic tank is not pumped regularly (once every 2-3 years for normal use), solids will likely enter the drainfield, causing it to fail. As the existing septic tanks are 20 years old, it is very likely they have not been pumped often enough to prevent solids overflow events. Although no clear evidence exists of acute drainfield failure, various residents have made occasional complaints of standing water and odors. This suggests the possibility of chronic failure, or slower drainage than desired.

One additional concern must be addressed. The communal drainfield on the east side of the Reservation is located within 20-feet of the present bank of the Sauk River. The river has eroded this bank recently, and could eventually uncover this drainfield, resulting in pollution to the river, and loss of function in the drainfield for the residents.

The Tribe has the appropriate resources to assume the O&M responsibilities for the sewer system improvements proposed by this project. The cost estimate for this project does not include any additional equipment and training to the Tribal Water & Sewer Department because the recommended sewer system improvements will not significantly increase the O&M time and cost requirements and responsibilities for the Tribe.

IV. Alternatives Considered and Analyzed

Alternative A: No Action

Alternative B: Replace water meters, install hydropneumatic pressure tank, and provide conventional mound systems over existing subsurface systems.

Alternative C: Replace water meters, construct 150,000 gallon welded steel standpipe, drill new community well to replace community well #2, abandon existing concrete standpipe, install communal aerobic treatment units with at-grade disposal fields.

Alternative D: Replace water meters, construct 150,000 gallon welded steel standpipe, drill new community well to replace community well #2, abandon existing well #2 and concrete standpipe, install communal effluent pumping stations with community package treatment plant and community drainfield.

Alternative Analysis

Alternative A: If no action is taken, the situation will only get worse, leading to potential events that will pollute the river, and possibly the community wells. Existing septic tanks are already showing evidence that exchange with the surrounding environment is occurring.

Alternative B: Although this alternative would correct the deficiencies that currently exist, it would not provide the most desirable solution. A hydropneumatic pressure tank would indeed provide sufficient pressure to eliminate nuisance low pressures in the system, but additional mechanical equipment (high service discharge pumps) would be required to provide for adequate flows in the event of a fire. This additional equipment would be cumbersome to operate and maintain. While conventional mound systems would provide adequate vertical separation with the seasonal high groundwater, they do not provide the advanced level of treatment that aerobic treatment sewage treatment systems do. This is especially significant if breakout of partially treated sewage effluent develops at various points along the toe of the mound, which would cause public health risks. The size and height of a mound system can be a detriment at some sites as well.

Alternative C: Alternative C includes drilling a new well to replace community well #2, resulting in two benefits: first, the threat of intrusion by the encroaching river would be removed, and second, the new well could be located up-gradient from the existing drainfields-thereby eliminating risk of contamination by same. It would remove the existing concrete standpipe, which is at best an aesthetic problem (chronic leaking), and at worst, at potential risk for structural failure. Aerobic sewage treatment would serve to provide a high quality of effluent, rich with oxygen, and treated to tertiary levels, including on average 70% nitrate removal. At-grade drainfields would provide minimal aesthetic concerns for height, standing approximately 30" above the ground, and would present a much lower risk for breakout, as the effluent is highly treated and thus less likely to form bio-matt forming clogging layers in the soil.

Alternative D: The recommended improvements for Alternative D to the water system are identical to Alternative C. In sewage treatment and disposal however, infrastructure development would be excessive, including the addition of several effluent collection chambers with pumps, and a centralized package treatment system. After treatment, a centralized and relatively large drainfield would be needed, sized for the total sewage flow. Currently, the only land that is potentially available is located in the center of the trust property, and surrounded by all of the homes. In addition, effluent from a package treatment plant is typically treated to a secondary level, which is of significantly lower quality than tertiary treated effluent. This would clearly be an unacceptable option to the Tribe, as aesthetic and safety concerns would ensue.

V. Recommended Alternative

Alternative C is the recommended alternative. Alternative C provides the best long-term solution to the chronic water pressure problems while providing fully adequate fire flows, pressures, and storage volume. No additional pumps or mechanical equipment is necessary. The recommended water system improvements include abandonment of community well #2, drilling a new well up-gradient, and at an acceptable distance from the nearest drainfield, replacing faulty and missing individual water meters, abandoning the existing concrete water storage tank, constructing a 150,000 gallon welded steel standpipe and abandoning the existing concrete tank, abandoning all septic tanks, installing new septic tanks and connecting them to new communal aerobic treatment units, and

constructing communal at-grade drainfields above the existing drainfields for final disposal of the highly-treated effluent.

Upon completion of the improvements proposed under this project, all water and sewer system components will comply with current state and federal design standards. This will result in better water service to the residents with increased pressure and fire flow. The recommended advanced aerobic sewage treatment system will protect the environment as well as help prevent contamination of the Tribe's water systems. O&M costs will not significantly increase and Tribal O&M personnel will be able to operate and maintain the recommended improvements with minimal training.

A summation of the existing water and sewer facilities and the respective recommended improvements follows:

Well #1

Well #1 is located near the community service building, and marginally outside the tolerable radius of horizontal separation from the nearest communal drainfield. This well is to remain in service, and will require no modifications. However, the protection of the groundwater pumped by this well will be improved, as a result of the nearest drainfield being replaced with an aerobic treatment system and an at-grade drainfield. This well will be further protected with installation of the recommended lining of the adjacent drainage ditch (either bentonite or concrete, which channels storm water runoff).

Well #2

Well #2 is located in the southeast corner of the reservation, and will be abandoned under the recommended alternative. A new well, expected to be similar in pumping capacity will be drilled at an alternate location, and will be connected to the community water system. A new submersible well pump, piping and controls will also be provided. Two potential sites exist for the new well: the southwest corner of the Reservation, behind the community services building, or a location to the north of the present tribal trust property, likely to be converted to trust land in the near future.

Pump/Motor Selections for Proposed Well

The new well pump is expected to be the same size as Well #2, which is approximately 45 gpm.

Water Well Capacity/Adequacy

The demands of the community can be met by either well. Two wells are in use, to provide redundancy in the system, thereby providing backup in the event of a failure in either of the wells. As the Reservation has been developed to capacity, there will be no need to provide additional supply than is currently required.

Pump Controls for Wells #1 and #2

The pump control system consists of separate control panels for well #1 and #2 installed in 1981 and 1983, respectively. Each pump's automatic mode of the control is connected to electrodes that are suspended in the water storage reservoir. The controls operate the water well pumps in a lead-lag mode in response to the level of water in the reservoir. There is

no alternator to switch the pumps in lead-lag sequence. A panel selector switch allows both pumps to be run on either automatic, hand, or off.

It is recommended that the existing controls be replaced, with new control wires connected to the proposed new well (#2). A remote telemetry unit (RTU) type of control system will be installed to provide automated control and alarm monitoring and warning capabilities.

Water Storage Reservoir

The existing water storage reservoir will be abandoned in place under the proposed alternative. This will entail draining the tank, disconnecting control connections, and isolating it from the water system with gate valves. It is recommended this tank be utilized as a backup storage facility should the new tank ever need to be drained for O&M such as cleaning or inspections.

It is proposed that a new 150,000-gallon (100' height X 16' diameter) welded steel standpipe be constructed under this alternative. The new tank will be located adjacent to the existing tank. The new reservoir will increase existing system pressure from of approximately 30 psi to 43 psi, and will provide sufficient pressurized storage for a fire flow requiring 500 gpm for one hour at any fire hydrant on the water system.

Water Distribution System

The existing water distribution system is composed of 6-inch PVC piping and is still in good operating condition. The piping is also adequate for potable needs and fire flow. However, the lack of readily identifiable and functional individual water meters at every service connection poses operational problems. In the event that an individual home needs to be isolated from the system, it would be extremely difficult in some situations to accomplish this, due to the lack of adequate water meters.

Recommended Alternative C proposes that all individual water meters be replaced with new ones, to be located within 5-feet outside of the property boundary of each home. This will provide for improved operations and maintenance by being able to monitor individual water usage to better detect leaks or excessive use.

Septic Tanks

There are approximately 22 septic tanks currently in operation; 20 of them serve individual homes, and two of them serve community buildings (community service building, and tribal office). Due to the age of these septic tanks, and from field observation, it is apparent that some (if not all) of these septic tanks are not watertight. Furthermore, without regular pumping, many of these tanks have acquired significant accumulation of solid material, rendering them insufficient in their ability to treat conventional sewage.

It is proposed under the Alternative C, that all of these septic tanks be replaced with 1,000 gallon, concrete, two-compartment septic tanks, meeting current design standards. This will serve to protect the environment, and improve efficiency of operations. The old septic tanks will be abandoned, which will require the pumping of all remaining sewage and solids, breaking the lid, and backfilling with approved fill material.

Aerobic Treatment Units

In order to provide advanced treatment to ensure protection to the environment as well as compliance with Washington State regulations, it is recommended that aerobic treatment systems be provided with UV disinfection, and at-grade drainfields for final disposal. This will be accomplished by installing four or five communally sized aerobic treatment units (each capable of handling daily loads from 4-5 houses), and connecting them to the new septic tanks.

Additionally, a small duplex pumping station will be required for each unit. This serves to provide regular dosing to the new at-grade drainfields, thereby optimizing treatment efficiency of the process.

At-Grade Drainfields

As land is extremely limited on the Reservation, it is proposed that at-grade bed type drainfields be installed directly above the existing conventional septic systems. These mounds will be approximately 2.5-feet high, and will be constructed using chamber units to house the small-diameter pressurized pipes for distribution. Cover soil will be provided over each at-grade drainfield.

The at-grade drainfields will provide year-round greater than 1-foot of separation from the floor of the drainfield and the worst-case seasonal high groundwater level, which would be the groundwater table surfacing. One-foot of separation is recommended as a minimum separation distance from advanced aerobically treated sewage effluent and the seasonal high groundwater level.

Funding For Proposed Improvements

The USDA-RUS will provide all funding under this project with grant/loan funds. The IHS will provide in-kind contributions in the form of engineering services, which shall include preliminary design evaluations, surveying, formal design, drafting, and inspection services. In addition, the IHS will provide technical assistance to the Tribe during construction in support of the tribally administered construction contract. The Tribe will provide in-kind contributions as well, for contract administration.

VI. Environmental Review

The Tribe and IHS have conducted an environmental review of the proposed facilities under this project in accordance with NEPA and related environmental laws, regulations, and Executive Orders. The Tribe submitted a complete environmental report accompanying its application for financial assistance to the USDA-RUS in September 2001.

No significant environmental effects resulting from this project have been identified; therefore a full environmental assessment is not required. The cumulative effect of this project will be an improvement in the health of Indian people served by the Sauk-Suiattle community water and sewer systems. The project qualifies for IHS' categorical exclusion from full consideration under NEPA and related environmental laws, regulations, and Executive Orders.

VII. Effect on SDS

This project was included in the Portland Area IHS Sanitation Deficiencies System (SDS) report for FY 2001 and scored very high. However, due to funding constraints for HUD-funded homes, the IHS was unable to provide funding for this project. Upon completion, this project will reduce the level of sanitation deficiencies in the Portland Area IHS.

VIII.

ADP Coding:

19-H1-FFZ ; Existing Indian homes
3-E2-FFZ; Existing non-residential

Notes: E1- Existing Home

E2- Non-Residential

H1-HUD Home

FFZ - Above minimal community water and sewer, both previously served, and no solid waste facilities

IX. Cost Estimate, Funding Summary, and Project Schedule

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT COST	TOTAL COST
Water Supply					
1.	Well head protection - drainage ditch lining	1	LS	\$ 2,000.00	\$ 2,000.00
2.	Well drilling mobilization	1	LS	\$ 3,000.00	\$ 3,000.00
3.	Well Abandonment	58	LF	\$ 54.80	\$ 3,178.40
4.	Drill new 8" well with casing	60	LF	\$ 55.00	\$ 3,300.00
5.	Submersible pump & wiring	1	LS	\$ 10,000.00	\$ 10,000.00
6.	Extend control and power wire	500	LF	\$ 5.00	\$ 2,500.00
7.	Stainless steel well screen	5	LF	\$ 75.00	\$ 375.00
8.	Water analysis	1	LS	\$ 3,000.00	\$ 3,000.00
9.	Test pumping	1	LS	\$ 2,400.00	\$ 2,400.00
10.	Replace old control system with RTU system	1	LS	\$ 25,000.00	\$ 25,000.00
11.	4" PVC water piping for new well	500	LF	\$ 18.00	\$ 9,000.00
12.	Abandon existing tank in place	1	LS	\$ 3,000.00	\$ 3,000.00
13.	Welded steel standpipe, 150,000 gallons, 100'X16' w/foundation, piping, paint, and appurtenances	1	LS	\$ 240,000.00	\$240,000.00
14.	Tank foundation soil test	1	LS	\$ 9,000.00	\$ 9,000.00
15.	Individual water meter replacement	23	EA	\$ 250.00	\$ 5,750.00
Subtotal - Water Supply					\$321,503.40
Waste Disposal					
16.	Septic tanks, concrete, 1000-gallon, two compartment	20	EA	\$ 1,200.00	\$ 24,000.00
17.	Aerobic treatment units	5	EA	\$ 14,500.00	\$ 72,500.00
18.	Pump vault w/dual submersible pumps & controls	5	EA	\$ 4,500.00	\$ 22,500.00
19.	Low-pressure dosed drainfield, at-grade	5	LS	\$ 12,000.00	\$ 60,000.00
20.	Existing septic tank abandonment	20	EA	\$ 250.00	\$ 5,000.00
21.	Effluent drainage line, 4" PVC	2000	LF	\$ 8.25	\$ 16,500.00
Subtotal Waste Disposal					\$200,500.00
Total Construction Cost					\$522,003.40
Contingencies @ 10%					\$ 52,200.34
Subtotal					\$574,203.74
Tribal Administration @ 2%					\$ 11,484.07
Maximum IHS Contribution to the Tribe					\$585,687.81
IHS Project Technical Support (PTS) @ 10%					\$ 58,568.78
Total Project Cost					\$644,256.60
Total Rounded Cost to Nearest \$1,000					\$644,000.00

In-Kind

IHS Engineering and Project Management Services @ 8.5%	\$ 54,740.00
Tribal In-Kind Legal and Administration Services @ 5%	<u>\$ 32,200.00</u>
Total In-Kind Contributions	\$ 86,940.00

Total Project Cost Including In-Kind Contributions	\$730,940.00
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Funding Summary

IHS in-kind contribution	\$ 54,740.00
Tribal in-kind contribution	\$ 32,200.00
USDA-RUS grand/loan	<u>\$ 644,000.00</u>
Total Project Cost	\$ 730,940.00

Proposed Project Schedule

MOA Approval	January 1, 2002
Begin Design	January 15, 2002
Complete Design	May 15, 2002
Construction Bid	June 15, 2002
Construction Start	August 1, 2002
Construction Completion	December 1, 2002
Final Report	June 15, 2003

X. Signature Page

Prepared By:

Michael Young, P.E., Project Engineer
Seattle District Office

Date

Reviewed By:

Michael Weaver, P.E., DEE, District Engineer.
Seattle District Office

Date

Recommended By:

Kelly R. Titensor, P.E., Director, DSFC
Portland Area IHS

Date

Approved By:

Richard R. Truitt, P.E., Associate Director, OEH&E

Date



DEPARTMENT OF HEALTH & HUMAN SERVICES

PUBLIC HEALTH SERVICE
INDIAN HEALTH SERVICE
1220 THIRD AVE., ROOM 476
PORTLAND, OR 97204

Memorandum

Date: April 5, 2002
From: Director, DSFC, OEH&E/PAO
Re: Memorandum of Understanding, RUS and IHS
To: Portland Area DSFC engineering staff

A8. Example RUS MOA

The Department of Agriculture Rural Utilities Service (RUS) and IHS executed a Memorandum of Understanding (MOU) on March 13, 2002. This agreement is intended to streamline the development and management of sanitation facilities projects that include RUS funds.

A copy of the signed MOU is attached. The terms of this MOU apply for all FY 2002 and future projects

In order to implement the provisions of the MOU for the contribution of RUS funds to IHS as described in Sections A and B, RUS and IHS have agreed on a two-step procedure as described in the following:


Step 1: IHS will send a written request to the RUS Rural Development Specialist requesting that the tribe and RUS execute any required loan closing and/or grant documents. This request is drafted by the Project Engineer or District Engineer and signed by the Director, DSFC. The request should be sent to RUS when bid solicitation is scheduled to be no less than approximately 45 days in the future. Upon execution of these documents, RUS will notify IHS. Bid solicitation will begin upon receipt of this notification from RUS.

Step 2: After bids/proposed costs have been received and reviewed and IHS has determined that a contract may be awarded (FAR contracts) or that a unit cost may be approved (tribal procurement), IHS will send a second written request to RUS that funds be transferred to IHS. This request is drafted by the Project Engineer or District Engineer and signed by the Director, DSFC. A copy of the bid abstract must be included as an attachment to the request. Award of the contract or unit cost approval shall be contingent upon receipt of the RUS funds.

Please note that this procedure will apply for both FAR contracts and tribal procurements where IHS will issue a unit cost approval. Tribal procurement includes any means the tribe may use to perform the work, typically contracting or force account.

Sample letters are attached for reference.

If you have any questions or comments, please contact me.


Kelly Titensor, Director
Division of Sanitation Facilities Construction, PAO

Attachments

MEMORANDUM OF UNDERSTANDING **RECEIVED**
BETWEEN **APR 01 2002**
UNITED STATES DEPARTMENT OF AGRICULTURE,
WASHINGTON STATE RURAL UTILITIES SERVICE **PAO/OSHE**
AND
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
PORTLAND AREA INDIAN HEALTH SERVICE

This Memorandum of Understanding (MOU) is made and entered into by the Rural Utilities Service, hereinafter referred to as RUS, an Agency of the Rural Development Mission Area, United States Department of Agriculture, and the Indian Health Service, hereinafter referred to as IHS, an Operating Division within the United States Department of Health and Human Services.

I. PURPOSE

The purpose of this MOU is to establish the framework of partnering and streamlining between RUS and the IHS in Washington State for providing assistance to American Indians in the development and construction of water, waste water, and solid waste facilities.

The MOU will be supplemented, as necessary, by individual Memoranda of Agreement (MOA) developed and executed by representatives of the participating agencies and the Tribes, to meet specific project requirements.

II. AUTHORITY

The MOU is entered into pursuant to the authority of P.L. 86-121, "The Indian Sanitation Facilities Act," and the "Consolidated Farm and Rural Development Act," as amended (7 U.S.C. 1926). The Nationwide MOU between IHS and RUS and signed on October 20, 2000, also serves as the foundation and parent document to this Washington State MOU and is considered to be, by this reference, a part of this document.

III. UNDERSTANDINGS – DELIVERY OF SERVICES

IHS and RUS will use one of the following direct service methods based on the individual project and Tribal request for these services:

A. IHS Federal Procurement – All funding Managed by IHS

- An MOA will be developed between IHS, RUS, and the Tribe based on individual project criteria, such as project budget, IHS charges, and environmental classification.
- IHS will serve as lead agency for all environmental evaluations, documentation, and compliance. RUS State Environmental Coordinator will review and suggest modifications or accept the environmental documentation.

- IHS will manage all RUS and other partner agency funds provided that the Tribe has agreed to such an arrangement in writing.
- IHS will develop a preliminary engineering report/project summary and send to RUS Engineer. RUS Engineer will review and suggest modifications or accept the preliminary engineering report (PER).
- IHS will provide all engineering design services including review and acceptance of plans and specifications (P&S), and contract documents consistent with approved PER.
- IHS will begin construction contract bid solicitation upon notification from RUS that the closing documents have been executed.
- IHS will use the federal acquisition regulations (FAR) to procure construction services and act as the lead agency on all contracting and construction activities.
- IHS will serve as the lead agency in lieu of RUS involvement for all other engineering services.
- RUS will work with the Tribe to assure that Loan/Grant funds are transferred to IHS prior to contract award.
- IHS will review and approve pay requests for all project costs and reimburse for work performed by the Contractor/s, the Tribe, and others.
- IHS, RUS, and the Tribe will conduct a joint pre-final inspection of the project.
- IHS will submit a project completion package to RUS including a final report and a complete financial summary to close out the project.

B. Tribal Procurement – All Funding Managed by IHS

- A MOA will be developed between IHS, RUS, and the Tribe based on individual project criteria, such as project budget, IHS charges, and environmental classification.
- IHS will serve as lead agency for all environmental evaluations, documentation, and compliance. RUS State Environmental Coordinator will review and suggest modifications or accept the environmental documentation.
- IHS will manage all RUS and other partner agency funds provided that the Tribe has agreed to such an arrangement in writing.
- IHS will develop a PER/IHS Project summary and send to the RUS Engineer. RUS Engineer will review and suggest modifications or accept the PER/IHS Project Summary.
- IHS will provide all engineering design services including review and acceptance of plans and specifications, and contract documents consistent with approved PER/IHS Project Summary.
- IHS shall provide contract documents, including plans and specifications, to the Tribe for construction contract bid solicitation upon notification from RUS that the closing documents have been executed.
- Tribe shall procure for construction using IHS and RUS procurement requirements as described in the MOA. Oversight by IHS will include engineering, technical assistance, site inspections and recommendation of approval of change orders for the Tribe.
- RUS will work with the Tribe to assure that Loan/Grant funds are transferred to IHS after bid review and concurrence and prior to unit cost approval by IHS.

- IHS will review pay requests for all project costs and reimburse tribe for approved construction costs as construction progresses.
- IHS will serve as the lead agency in lieu of RUS involvement for all other engineering services.
- IHS, RUS, and the Tribe will conduct a joint pre-final inspection of the project.
- IHS will submit a project completion package to RUS including a final report and a complete financial summary to close out the project.

C. Tribal Procurement – All Funding Managed by the Tribe

- An MOA will be developed between the Tribe and IHS to include project budget, IHS charges, and environmental responsibilities.
- RUS processes and procedures as outlined in RUS 1780 will be followed. These include RUS review and approval of preliminary engineering reports, engineering services agreements, plans and specifications, monthly site inspections, change orders and so forth.
- RUS funds will go directly to the Tribe when needed.
- IHS serves in a consulting role to the Tribe and may contribute funds and/or in-kind services to the project.
- IHS may serve as the lead agency for project related environmental evaluations, documentation and compliance at the tribes request; otherwise, the engineering consultants planning and designing the proposal shall prepare the appropriate environmental documentation consistent with 7 CFR 1794. Tribe shall procure for construction using RUS procurement requirements.
- If IHS provides engineering services, the Tribe will reimburse for the project technical services (PTS) and any other services provided by IHS.
- For those projects engineered by IHS, the MOA may be written to include IHS engineering services and costs, which will meet the RUS engineering services agreement requirement.

D. Environmental Services

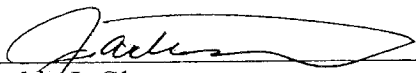
- IHS agrees to serve as lead agency (ref. 40 CFR 1501.5 and 1501.6) for NEPA compliance activities. RUS and IHS shall agree upon the classifications of each proposal. Level-of-review classifications and implementation procedures shall be determined by and be consistent with the highest level of review in each agency's regulation. Agencies agree to joint public involvement procedures under IHS's lead including listing RUS as cooperating agency for all public notices.
- Environmental documents will be reviewed simultaneously with engineering documents. Prior to publication of "Finding of No Significant Impact" public notices, IHS shall provide RUS, for its concurrence, copies of project related environmental review documentation. Upon completion of the environmental review process, IHS shall provide copies of all associated documentation to RUS for its files.
- If the RUS funded activities deviate from the original IHS project scope, RUS will supplement or request IHS to supplement its NEPA document.

V. DURATION AND MODIFICATION OF AGREEMENT

This MOU, or any revision hereto, becomes effective when signed by the two parties. This MOU shall remain in effect unless terminated by either party after 60-days prior written notice to the other party.

APPROVALS:

UNITED STATES DEPARTMENT OF AGRICULTURE,
RURAL UTILITIES SERVICE




Jackie J. Gleason
State Director, Washington

3/13/02

Date

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
INDIAN HEALTH SERVICE



Doni Wilder
Director, Portland Area Indian Health Service

3/13/02

Date

SAMPLE

Rural Development Specialist
U.S. Department of Agriculture,
Rural Utilities Service

Letter No. 1

RE: Request for Loan Closing/Grant Agreement Execution

Dear Ms/Mr. _____:

Under the Memorandum of Agreement (MOA) for Project PO-02-XYZ, IHS agreed to assist the _____ Tribe with construction of sanitation facilities serving _____ homes in the community of _____ on the _____ Indian Reservation. USDA-RUS, in turn agreed to make a financial contribution to cover the cost/a portion of the cost of the facilities and related services.

IHS is near completion of the construction contract documents. **IHS/The Tribe** is planning to begin the solicitation of bids for construction in approximately 45 days. The bids will be advertised for a period of 30 days. After bid opening, IHS will evaluate the bids and make a determination regarding **contract award/unit cost approval**.

IHS certifies that all rights-of way and easements have been obtained for the project.

Therefore, in accordance with Paragraph ____ of the MOA, IHS respectfully requests that USDA-RUS and the Tribe proceed with processing of loan closing documents and/or grant agreements for the USDA-RUS portion of funds.

Please notify this office as soon as the Tribe and USDA-RUS have executed the loan closing documents and/or grant agreements

If you have any questions, please contact me at (503) 326-3155.

Sincerely,

Kelly R. Titensor, P.E.
Director, Division of Sanitation Facilities Construction

cc: Sandra Boughton, USDA-RUS, Wenatchee, WA.

SAMPLE

Letter No. 2

Rural Development Specialist
U.S. Department of Agriculture,
Rural Utilities Service

RE: Request for Transfer of Funds

Dear Ms/Mr. _____:

Under the Memorandum of Agreement (MOA) for Project PO-02-XYZ, IHS agreed to assist the _____ Tribe with construction of sanitation facilities serving _____ homes in the community of _____ on the _____ Indian Reservation. In turn, USDA-RUS agreed to make a financial contribution to IHS for **the cost/a portion** of the cost of the facilities and related services.

IHS/The Tribe has solicited bids for construction of the sanitation facilities as described in the Project Summary/Preliminary Engineering Report and MOA for Project PO-02-XYZ. IHS has evaluated the bids and determined that a contract may be awarded in the amount of \$ _____. IHS is prepared to **award this contract/provide a unit cost approval to the Tribe for this work** as soon as the USDA-RUS funds have been received. A copy of the bid abstract is attached for your records.

Therefore, in accordance with Paragraph ____ of the Memorandum of Agreement, IHS respectfully requests that USDA-RUS transfer funds in the amount of \$ _____ to IHS as soon as possible. **Award of the contract/Issuance of the unit cost approval** is contingent on receipt of these funds by IHS.

USDA-RUS funds will be applied towards construction of the facilities and provision of the services described in the Project Summary/Preliminary Engineering Report for Project PO-02-XYZ.

Please contact this office to arrange for the financial transactions necessary to transfer USDA-RUS funds to IHS.

If you have any questions, please contact me at (503) 326-3155.

Sincerely,

Kelly R. Titensor, P.E.
Director, Division of Sanitation Facilities Construction

Attachments

cc: Sandra Boughton, USDA-RUS, Wenatchee, WA.

A9. Example NAHASDA²⁵/HUD MOA

MEMORANDUM OF AGREEMENT
AMONG

THE UNITED STATES OF AMERICA

THE _____ TRIBE

AND

THE _____ HOUSING AUTHORITY

This Agreement is made among the Indian Health Service, hereinafter referred to as IHS, of the Department of Health and Human Services (HHS), under and pursuant to the provisions of Section 7 (a)(3) of Public Law 86-121 (42 USC 2004 (a), 73 Stat. 267); the _____ Tribe hereinafter referred to as the Tribe, acting through its Chairman and the _____ Housing Authority, hereinafter referred to as the Authority, acting through its Executive Director.

WHEREAS, the Authority is undertaking construction of _____ housing units with financial assistance from HUD as part of a housing located at _____ and known as HUD assisted Project No. _____; and

WHEREAS, the Authority, (by Project Proposal dated _____) requests IHS assistance in the provision of off-site water and sewer facilities to support the HUD assisted Indian Housing units for HUD assisted Project No. _____;

NOW THEREFORE, in order to carry out the water and sewer facilities project as set forth in the attached Project Summary dated _____, the parties mutually agree that:

1. The IHS shall provide to the Authority all materials, supplies, equipment, labor, tests, consultations, and inspections, necessary for construction of off-site water and sewer facilities for the HUD assisted housing units in the project in accordance with the attached Project Summary.
2. The Authority shall contribute to the IHS an amount totaling \$ _____ for construction of off-site water and sewer facilities under Paragraph 1 of this agreement.
3. In the case of off-site water and sewer facilities which serve both HUD assisted housing units and non-HUD assisted housing units, the Authority's contribution shall be used only for the pro-rata share attributable to the HUD assisted units as provided in the attached Project Summary. Authority funds shall not be used to provide water and sewer facilities attributable to the non-HUD assisted units and the IHS shall arrange for other funds for the non-HUD assisted portion of the sewer and water facilities.
4. If the actual costs of providing the off-site water and sewer facilities for the HUD assisted housing units are less than the amount of the Authority's contribution, then the difference will be refunded to the Authority. If, on the other hand, the revised projections of actual costs of providing the pro-rata share of the off-site water and sewer facilities for the HUD assisted housing units will exceed the Authority's contribution, then the IHS will so notify the Authority and HUD. The Authority will then provide an additional pro-rata contribution to the IHS. Any additional contribution by the Authority shall be subject to the availability of funds. It is understood that the Authority must make an additional contribution to the IHS prior to the IHS performing any work or incurring any costs under this agreement (or amendments thereto) which will involve pro-rata costs in excess of the Authority's contribution.
5. The off-site water and sewer facilities shall be constructed in accordance with existing standards and procedures used by the IHS for construction of such facilities. Construction shall begin as soon as practicable after this Agreement becomes effective (see paragraph 19), in accordance with a schedule to be agreed on by the IHS and the Authority.
6. The Authority shall require the housing construction contractor or Turnkey developer to coordinate the installation of on-site water and sewer facilities with the IHS and to notify the IHS project officer at the appropriate times to facilitate necessary inspections of on-site water and sewer facilities construction.

²⁵Native American Housing Assistance and Self-Determination Act of 1996

7. The IHS shall maintain a set of accounting records for recording all transactions relating to funds received from the Authority for this project. The IHS shall provide to the Authority, upon request, detailed accounting data relating to costs incurred for this project.
8. The Tribe and/or Authority, as appropriate, shall obtain and provide all rights-of-way, easements, or other interest in land determined necessary to carry out the obligation of the IHS under this agreement.
9. The Tribe and Authority hereby grant permission for the IHS and its representatives to enter upon or across lands under control of the Tribe or Authority, without charge, for the purpose of carrying out the project outlined in the attached Project Summary as provided for this Agreement, and further agree to waive all claims which may arise by reason of such entry upon those lands, except those that may be recognized under the Federal Tort Claims Act.
10. [Insert NEPA, environmental, historic preservation, cultural properties, and discovery clauses; as appropriate.]
11. The Tribe and Authority shall abide by the recommendations of the IHS regarding testing, construction, inspection and final review of the facilities provided under this Agreement, in order to assure that the facilities will function properly and meet minimum public health standards.
12. In consideration of the contributions made and the maintenance responsibilities undertaken herein by the Tribe upon completion of the project, the IHS will transfer to the Tribe without charge, all rights, title and interest in the water and sewer facilities including all materials, supplies, and equipment provided for and incorporated therein pursuant to this agreement.
13. The Tribe or the responsible operations and maintenance organization will adopt rules and regulations governing the operation and maintenance of the installed community water and sewer facilities to include user rates and a bookkeeping system to enable the Tribe, or other organization, to sustain the effective operation and maintenance of these systems. These rules and regulations shall have the concurrence of the IHS and shall be in force prior to the date of transfer.
14. The Tribe or the responsible operation and maintenance organization will accept transfer of the community water and sewer facilities and assume responsibility for the maintenance, operation and repair of such facilities as its own property, so as to keep them in an effective and operating condition. The IHS shall provided instruction to appropriate tribal and other officials regarding the proper utilization, maintenance, operation and protection of the water and sewer facilities transferred.
15. It is the understanding of the parties to this Agreement that participants whose units will be connected to the community water and sewer facilities will be responsible to the Tribe or other responsible entity for the payment of the monthly service charge, unless funds are identified for operation and maintenance from another source, and that these participants must adhere to the rules and regulations adopted by the Tribe.
16. For facilities provided by IHS with funds contributed by the Authority, the IHS, to the extent economically feasible, will obtain a 1-year warranty for the Authority from the IHS contractors, suppliers, and manufacturers on equipment, work, and supplies provided by them. The IHS shall assist the Tribe or other responsible operation and maintenance organization in obtaining the benefits and protections of all warranties on equipment or work provided under this Agreement. In the event of a problem occurring within the first year of installation with the design or construction of IHS installed facilities on equipment or work not protected by the warranties of the suppliers or manufacturers, the IHS will correct the problem, subject to the availability of funds and staff resources as determined by the IHS.
17. [Disputes clause, as appropriate.]
18. Any party to this agreement may pursue its right and remedies for breach of the terms or responsibilities by any party to this Agreement.

19. This Agreement shall take effect upon transfer of the full amount of the contribution provided for in paragraph 2 to the IHS and execution by the Tribe, the Authority, and the IHS.

_____	_____
HHS	Date
_____	_____
Tribe	Date
_____	_____
TDHE	Date
_____	_____
Responsible Operation and Maintenance Organization (if appropriate)	Date

Attachment: *Project Summary*

ALTERNATE PARAGRAPH 19, TO BE USED INSTEAD OF PARAGRAPH 19 ABOVE ONLY WHEN THE PROJECT SUMMARY SPECIFIED A PHASED PROJECT

19. The water and sewer project which is the subject of this agreement will be implemented by phase construction in accordance with the attached Project Summary. The total cost of the phases will equal the amount of the contribution provided for in paragraph 2. Each phase shall represent a separate agreement under the MOA, and each agreement shall only become effective upon transfer of the full amount of the Authority's contribution for that phase of the MOA (see list below) and execution by the Tribe, the Authority, and the IHS.

Phase I \$ ____
Phase II \$ ____
Phase III \$ ____
Total \$ ____

APPENDIX B

General Provisions for Tribal Contracts

Schedule A--Bidding Instructions and Bid Schedule
Schedule B--General Conditions
Schedule C--Labor Provisions
Schedule D--Special Provisions
Schedule E--Exhibits
Schedule F--Submittal Requirements
Schedule G--Technical Provisions
Schedule H--Drawings

Requirements for Tribal Procurement
under P.L. 86-121

Schedule A	-	Bidding Instructions and Bid Schedule (Specific to Contract)
Schedule B	-	General Conditions
Schedule C	-	Labor Provisions
Schedule D	-	Special Provisions
Schedule E	-	Exhibits (Specific to Contract)
Schedule F	-	Submittal Requirements
Schedule G	-	Technical Provisions (Specific to Contract)
Schedule H	-	Drawings (Specific to Contract)

Note:

Standard form contracts in the construction industry provide a convenient and cost-effective means of contracting, and they help define what the industry expects from contractual relationships. While certain schedules and conditions are required for Federally funded projects, there are other standard forms or boilerplate contracts than what is presented in this Appendix, including:

- American Institute of Architects (AIA);
- Engineers Joint Contract Documents Committee (EJCDC) and
- Associated General Contractors of America (AGC).

These contract families are similar at many ways; however, each organization has a different perspective on the most appropriate way to procure and contract for services.

Schedule A
Bidding Instruction
and Bid Schedule

(Insert Bid Schedule and Instructions to Bidders Here)

GENERAL CONDITIONS

- | | |
|-------------------------------------------------------------------------------------------|--------------------------------------------------------|
| 01. Definitions | 24. Time for Completion and Liquidated Damages |
| 02. Additional Instructions and Detail Drawings | 25. Progress Schedules and Requirements for Compliance |
| 03. Reports and Records | 26. Land and Rights-of-Way |
| 04. Drawings and Specifications | 27. Suspension of Work, Termination and Delay |
| 05. Site Investigation and Conditions Affecting the Work | 28. Inspection and Testing |
| 06. Shop Drawings | 29. Correction of Work |
| 07. Materials, Services and Facilities | 30. Changes in the Work |
| 08. Substitutions | 31. Changes in Contract Price |
| 09. Patents | 32. Differing Site Conditions |
| 10. Surveys, Permits, Regulations | 33. Use and Possession Prior to Completion |
| 11. Laws and Regulations Affecting Work | 34. Cleanup and Finish Grading |
| 12. Taxes | 35. Measurement and Payment |
| 13. Protection of Work, Property, Persons | 36. Variation in Estimated Quantities |
| 14. Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements | 37. Payments to Contractor |
| 15. Operations and Storage Areas | 38. Assignments |
| 16. Insurance | 39. Guaranty |
| 17. Indemnification | 40. Acceptance of Final Payment as Release |
| 18. Contract Security | 41. Engineer's Role and Authority |
| 19. Accident Prevention and Safety Program | 42. Resolution of Disputes |
| 20. Temporary Sanitary Facilities | 43. Equal Employment Opportunity |
| 21. Supervision by Contractor | 44. Clean Air and Water |
| 22. Subcontracting | 45. Indian Health Service |
| 23. Separate Contracts | |

1. DEFINITIONS

- 1.1 Wherever used in the CONTRACT DOCUMENTS, the following terms shall have the meanings indicated which shall be applicable to both the singular and plural thereof:
- 1.2 ADDENDA - Written or graphic instruments issued prior to the execution of the Agreement which modify or interpret the CONTRACT DOCUMENTS, DRAWINGS and SPECIFICATIONS, by additions, deletions, clarifications or corrections.
- 1.3 BID - The offer or proposal of the BIDDER submitted on the prescribed form setting forth the prices for the WORK to be performed.
- 1.4 BIDDER - Any person, firm or corporation submitting a BID for the WORK.
- 1.5 BONDS - Bid, Performance, and Payment Bonds and other instruments of security, furnished by the CONTRACTOR and his surety in accordance with the CONTRACT DOCUMENTS.
- 1.6 CHANGE ORDER - A written order to the CONTRACTOR authorizing an addition, deletion or revision in the WORK within the general scope of the CONTRACT DOCUMENTS, or authorizing an adjustment in the CONTRACT PRICE or CONTRACT TIME.
- 1.7 CONTRACT DOCUMENTS - The contract, including Advertisement For Bids, Information For Bidders, BID, Bid Bond, Agreement, General Provisions, Labor Provisions, Special Provisions, Payment Bond, Performance Bond, NOTICE OF AWARD, NOTICE TO PROCEED, CHANGE ORDER, DRAWINGS, Technical Provisions, Submittal Requirements, and ADDENDA.
- 1.8 CONTRACT PRICE - The total monies payable to the CONTRACTOR under the terms and conditions of the CONTRACT DOCUMENTS.
- 1.9 CONTRACT TIME - The number of calendar days stated in the CONTRACT DOCUMENTS for the completion of the WORK.
- 1.10 CONTRACTING OFFICER - The person with the OWNER organization who is authorized to administer the contract for the OWNER.

- 1.11 CONTRACTING OFFICER'S REPRESENTATIVE - The representative of the CONTRACTING OFFICER authorized to deal with the CONTRACTOR at the site to administer the technical aspects of the CONTRACT, and to assure compliance with the drawings and specifications.
- 1.12 CONTRACTOR - The person, firm or corporation with whom the OWNER has executed the Agreement.
- 1.13 DRAWINGS - The part of the CONTRACT DOCUMENTS which show the characteristics and scope of the WORK to be performed and which have been prepared or approved by the ENGINEER.
- 1.14 ENGINEER - The person, firm or corporation named as such in the CONTRACT DOCUMENTS.
- 1.15 FIELD ORDER - A written order effecting a change in the WORK not involving an adjustment in the CONTRACT PRICE or an extension of the CONTRACT TIME, issued by the ENGINEER to the CONTRACTOR during construction.
- 1.16 INDIAN HEALTH SERVICE (IHS) - Federal agency which is providing funding and/or technical assistance to the Owner on this project.
- 1.17 NOTICE OF AWARD - The written notice of the acceptance of the BID from the OWNER to the successful BIDDER.
- 1.18 NOTICE TO PROCEED - Written communication issued by the OWNER to the CONTRACTOR authorizing him to proceed with the WORK and establishing the date of commencement of the WORK.
- 1.19 OWNER - A public or quasi-public body or authority, tribe, corporation, association, partnership, or individual for whom the WORK is to be performed.
- 1.20 PROJECT - The undertaking to be performed as provided in the CONTRACT DOCUMENTS.
- 1.21 RESIDENT PROJECT REPRESENTATIVE - The authorized representative of the OWNER who is assigned to the PROJECT site or any part thereof.
- 1.22 SHOP DRAWINGS - All drawings, diagrams, illustrations, brochures, schedules and other data which are prepared by the CONTRACTOR, a SUBCONTRACTOR, manufacturer, SUPPLIER or distributor, which illustrate how specific portions of the WORK shall be fabricated or installed.
- 1.23 SPECIFICATIONS - A part of the CONTRACT DOCUMENTS consisting of written descriptions of a technical nature of materials, equipment, construction systems, standards and workmanship.
- 1.24 SUBCONTRACTOR - An individual, firm or corporation having a direct contract with the CONTRACTOR or with any other SUBCONTRACTOR for the performance of a part of the WORK at the site.
- 1.25 SUBSTANTIAL COMPLETION - That date as certified by the ENGINEER when the construction of the PROJECT is sufficiently completed in accordance with the CONTRACT DOCUMENTS, so that the PROJECT or specified part can be utilized for the purposes for which it is intended.
- 1.26 SPECIAL PROVISIONS - Modifications and additions to General Provisions which may be required by a Federal agency for participation in the PROJECT, or such requirements that may be imposed by applicable state or local laws, or the OWNER's contracting practices.
- 1.27 SUPPLIER - Any person or organization who supplies materials or equipment for the WORK, including that fabricated to a special design, but who does not perform labor at the site.
- 1.28 TRIBE - The governing body of the INDIAN TRIBE which has jurisdiction on the INDIAN RESERVATION on or near which the WORK will be performed.
- 1.29 WORK - All labor necessary to produce the construction required by the CONTRACT DOCUMENTS and all materials and equipment incorporated or to be incorporated in the PROJECT.

- 1.30 WRITTEN NOTICE - Any notice to any party of the Agreement relative to any part of this Agreement in writing and considered delivered and the service thereof completed, when posted by certified or registered mail to the said party at his last given address, or delivered in person to said party or his authorized representative on the WORK.
2. ADDITIONAL INSTRUCTIONS AND DETAIL DRAWINGS
- 2.1 The CONTRACTOR may be furnished additional instructions and detail drawings, by the ENGINEER, as necessary to carry out the WORK required by the CONTRACT DOCUMENTS.
- 2.2 The additional drawings and instruction thus supplied will become a part of the CONTRACT DOCUMENTS. The CONTRACTOR shall carry out the WORK in accordance with the additional detail drawings and instructions.
3. REPORTS AND RECORDS
- 3.1 The CONTRACTOR shall submit to the OWNER such schedule of quantities and costs, payrolls, reports, estimates, records and other data where applicable as are required by the CONTRACT DOCUMENTS for the WORK to be performed.
- 3.2 The CONTRACTOR shall keep all records related to the CONTRACT for a minimum of three years after acceptance of the completed work.
4. DRAWINGS AND SPECIFICATIONS
- 4.1 The intent of the DRAWINGS and SPECIFICATIONS is that the CONTRACTOR shall furnish all labor, materials, tools, equipment, and transportation necessary for the proper execution of the WORK in accordance with the CONTRACT DOCUMENTS and all incidental work necessary to complete the PROJECT in an acceptable manner, ready for use, occupancy or operation by the OWNER.
- 4.2 In case of conflict between the DRAWINGS and SPECIFICATIONS, the SPECIFICATIONS shall govern. Figure dimensions on DRAWINGS shall govern over scale dimensions, and detailed DRAWINGS shall govern over general DRAWINGS.
- 4.3 Any discrepancies found between the DRAWINGS and SPECIFICATIONS and site conditions or any inconsistencies or ambiguities in the DRAWINGS or SPECIFICATIONS shall be immediately reported to the ENGINEER, in writing, who shall promptly correct such inconsistencies or ambiguities in writing. WORK done by the CONTRACTOR after his discovery of such discrepancies, inconsistencies or ambiguities shall be done at the CONTRACTOR'S risk.
5. SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK
- 5.1 The CONTRACTOR will take steps necessary to ascertain the nature and location of the work, and investigate the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The CONTRACTOR also will observe and determine the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the OWNER, as well as from the drawings and specifications made a part of this contract. Any failure of the CONTRACTOR to take the actions described and acknowledged in this paragraph will not relieve the CONTRACTOR from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the OWNER.
- 5.2 The OWNER assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the OWNER. The OWNER does not assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its representatives before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

6. SHOP DRAWINGS

- 6.1 The CONTRACTOR shall provide SHOP DRAWINGS as may be necessary for the prosecution of the WORK as required by the CONTRACT DOCUMENTS. The ENGINEER shall promptly review all SHOP DRAWINGS. The ENGINEER'S approval of any SHOP DRAWING shall not release the CONTRACTOR from responsibility for deviations from the CONTRACT DOCUMENTS. The approval of any SHOP DRAWING which substantially deviates from the requirement of the CONTRACT DOCUMENTS shall be evidenced by a CHANGE ORDER.
- 6.2 When submitted for the ENGINEER'S review, SHOP DRAWINGS shall bear the CONTRACTOR'S certification that he has reviewed, checked and approved the SHOP DRAWINGS and that they are in conformance with the requirements of the CONTRACT DOCUMENTS.
- 6.3 Portions of the WORK requiring a SHOP DRAWING or sample submission shall not begin until the SHOP DRAWING or submission has been approved by the ENGINEER. A copy of each approved SHOP DRAWING and each approved sample shall be kept in good order by the CONTRACTOR at the site and shall be available to the ENGINEER.

7. MATERIALS, SERVICES AND FACILITIES

- 7.1 It is understood that, except as otherwise specifically stated in the CONTRACT DOCUMENTS, the CONTRACTOR shall provide and pay for all materials, labor, tools, equipment, water, light, power, transportation, supervision, temporary construction of any nature, and all other services and facilities of any nature whatsoever necessary to execute, complete, and deliver the WORK within the specified time.
- 7.2 Materials and equipment shall be so stored as to insure the preservation of their quality and fitness for the WORK. Stored materials and equipment to be incorporated in the WORK shall be located so as to facilitate prompt inspection.
- 7.3 Manufactured articles, materials and equipment shall be applied, installed, connected, erected, used, cleaned and conditioned as directed by the manufacturer.
- 7.4 Materials, supplies and equipment shall be in accordance with samples submitted by the CONTRACTOR and approved by the ENGINEER.
- 7.5 Materials, supplies or equipment to be incorporated into the WORK shall not be purchased by the CONTRACTOR or the SUBCONTRACTOR subject to a chattel mortgage or under a conditional sale contract or other agreement by which an interest is retained by the seller.

8. SUBSTITUTIONS

- 8.1 Whenever a material, article or piece of equipment is identified on the drawings or specifications by reference to brand name or catalogue number, it shall be understood that this is referenced for the purpose of defining the performance or other salient requirements and that other products of equal capacities, quality and function shall be considered. The CONTRACTOR may recommend the substitution of a material, article, or piece of equipment of equal substance and function for those referred to in the CONTRACT DOCUMENTS by reference to brand name or catalogue number, and if, in the opinion of the ENGINEER, such material, article, or piece of equipment is of equal substance and function to that specified, the ENGINEER may approve its substitution and use by the CONTRACTOR. Any cost differential shall be deductible from the CONTRACT PRICE and the CONTRACT DOCUMENTS shall be appropriately modified by CHANGE ORDER. The CONTRACTOR warrants that if substitutes are approved, no major changes in the function or general design of the PROJECT will result. Incidental changes or extra component parts required to accommodate the substitute will be made by the CONTRACTOR without a change in the CONTRACT PRICE or CONTRACT TIME.

9. PATENTS

- 9.1 The CONTRACTOR shall pay all applicable royalties and license fees. He shall defend all suits or claims for infringement of any patent rights and save the OWNER harmless from loss on account

thereof, except that the OWNER shall be responsible for any such loss when a particular process, design, or the product of a particular manufacturer or manufacturers is specified, however if the CONTRACTOR has reason to believe that the design, process, or product specified is an infringement of a patent, he shall be responsible for such loss unless he promptly gives such information to the ENGINEER.

10. SURVEYS, PERMITS, REGULATIONS

- 10.1 The OWNER shall furnish all boundary surveys and establish all base lines for locating the principal component parts of the WORK together with a suitable number of bench marks adjacent to the WORK as shown in the CONTRACT DOCUMENTS. From the information provided by the OWNER, unless otherwise specified in the CONTRACT DOCUMENTS, the CONTRACTOR shall develop and make all detail surveys needed for construction such as slope stakes, batter boards, stakes for pile locations and other working points, lines, elevations and cut sheets.
- 10.2 The CONTRACTOR shall carefully preserve bench marks, reference points and stakes and, in case of willful or careless destruction, he shall be charged with the resulting expense and shall be responsible for any mistakes that may be caused by their unnecessary loss or disturbance.
- 10.3 Permits and licenses of a temporary nature necessary for the prosecution of the WORK shall be secured and paid for by the CONTRACTOR unless otherwise specified in the CONTRACT DOCUMENTS. Permits, licenses and easements for permanent structures or permanent changes in existing facilities shall be secured and paid for by the OWNER, unless otherwise specified. The CONTRACTOR shall give all notices and comply with all laws, ordinances, rules and regulations bearing on the conduct of the WORK as drawn and specified. If the CONTRACTOR observes that the CONTRACT DOCUMENTS are at variance therewith, he shall promptly notify the ENGINEER in writing, and any necessary changes shall be adjusted as provided in Section 30 - "CHANGES IN THE WORK".

11. LAWS AND REGULATIONS AFFECTING WORK

- 11.1 The CONTRACTOR shall at all times observe and comply with Federal, State, City, County and Tribal laws, ordinances and regulations which in any manner affect the conduct of the work; and all such orders and decrees as exist at the present and which may be enacted later by legislative bodies or tribunals having legal jurisdiction or authority over the work. No pleas of misunderstanding or ignorance thereof will be considered. The CONTRACTOR shall be wholly responsible for any claim or liability arising from or based on the violation of any such law, ordinance, regulation, order or decree.

12. TAXES

- 12.1 The CONTRACTOR will pay all sales, consumer, use and other similar taxes required by the law of the place where the WORK is performed.

13. PROTECTION OF WORK, PROPERTY AND PERSONS

- 13.1 The CONTRACTOR will be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the WORK. He will take all necessary precautions for the safety of and will provide the necessary protection to prevent damage, injury or loss to all employees on the WORK and other persons who may be affected thereby, all the WORK and all materials or equipment to be incorporated therein, whether in storage on or off the site, and other property at the site or adjacent thereto.

14. PROTECTION OF EXISTING VEGETATION, STRUCTURES, EQUIPMENT, UTILITIES, AND IMPROVEMENTS

- 14.1 The CONTRACTOR shall preserve and protect all structures, equipment, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site, which are not to be removed and which do not unreasonably interfere with the work required under this contract. The CONTRACTOR shall remove trees only when specifically authorized to do so, and shall avoid damaging vegetation that will remain in place. If any limbs or branches of trees are broken during contract performance, or by the careless operation of equipment, or by workmen, the CONTRACTOR shall trim those limbs or branches with a clean cut and paint the cut with a tree-pruning compound as directed by the ENGINEER.

14.2 The CONTRACTOR shall protect from damage all existing improvements and utilities (1) at or near the work site and (2) on adjacent property of a third party, the locations of which are made known to or should be known by the CONTRACTOR. The existence and location of utilities are not guaranteed by the OWNER and shall be investigated and verified in the field by the CONTRACTOR before commencing construction activities in any particular area. The CONTRACTOR shall repair any damage to those facilities, including those that are the property of a third party, resulting from failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work. If the CONTRACTOR fails or refuses to repair the damage promptly, the OWNER may have the necessary work performed and charge the cost to the CONTRACTOR.

15. OPERATIONS AND STORAGE AREAS

15.1 The CONTRACTOR shall confine all operations (including storage of materials) to areas authorized or approved by the OWNER. The CONTRACTOR shall hold and save the OWNER and its representatives, free and harmless from liability of any nature occasioned by the CONTRACTOR's performance.

15.2 Temporary buildings (e.g., storage sheds, shops, offices) and utilities may be erected by the CONTRACTOR only with the approval of the OWNER and shall be built with labor and materials furnished by the CONTRACTOR without expense to the OWNER. The temporary buildings and utilities shall remain the property of the CONTRACTOR and shall be removed by the CONTRACTOR at its expense upon completion of the work. Only with the written consent of the OWNER may the buildings and utilities be abandoned and not removed.

15.3 The CONTRACTOR shall use only established roadways, or use temporary roadways constructed by the CONTRACTOR when and as authorized by the OWNER. In such case, the CONTRACTOR shall minimize disruption and delays to traffic in the affected areas. When materials are transported in prosecuting the work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any Federal, State, or local law or regulation. When it is necessary to cross curbs or sidewalks, the CONTRACTOR shall protect them from damage. The CONTRACTOR shall repair or pay for the repair of any damaged curbs, sidewalks, or roads.

16. INSURANCE

16.1 The CONTRACTOR shall purchase and maintain such insurance as will protect him from claims set forth below which may arise out of or result from the CONTRACTOR'S execution of the WORK, whether such execution be by himself or by any SUBCONTRACTOR or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

16.1.1 Claims under workmen's compensation, disability benefit and other similar employee benefit acts;

16.1.2 Claims for damages because of bodily injury, occupational sickness or disease, or death of his employees;

16.1.3 Claims for damages because of bodily injury, sickness or disease, or death of any person other than his employees;

16.1.4 Claims for damages insured by usual personal injury liability coverage which are sustained (1) by any person as a result of an offense directly or indirectly related to the employment of such person by the CONTRACTOR, or (2) by any other person; and

16.1.5 Claims for damages because of injury to or destruction of tangible property, including loss of use resulting therefrom.

16.2 Certificates of Insurance acceptable to the OWNER shall be filed with the OWNER prior to commencement of the WORK. These Certificates shall contain a provision that coverages afforded under the policies will not be cancelled unless at least fifteen (15) days prior WRITTEN NOTICE has been given to the OWNER.

16.3 The CONTRACTOR shall procure and maintain, at his own expense, during the CONTRACT TIME, liability insurance as hereinafter specified;

- 16.3.1 CONTRACTOR'S General Public Liability and Property Damage Insurance including vehicle coverage issued to the CONTRACTOR and protecting him from all claims for personal injury, including death, and all claims for destruction of or damage to any property, arising out of or in connection with any operations under the CONTRACT DOCUMENTS, whether such operations be by himself or by any SUBCONTRACTOR under him, or anyone directly or indirectly employed by the CONTRACTOR or by a SUBCONTRACTOR under him. Insurance shall be written with a limit of liability of not less than \$500,000 for all damages arising out of bodily injury, including death, at any time resulting therefrom, sustained by any one person in any one accident; and a limit of liability of not less than \$1,000,000 aggregate for any such damages sustained by two or more persons in any one accident. Insurance shall be written with a limit of liability of not less than \$200,000 for all property damage sustained by any one person in any one accident; and a limit of liability of not less than \$500,000 aggregate for any such damage sustained by two or more persons in any one accident.
- 16.3.2 The CONTRACTOR shall acquire and maintain, if applicable, Fire and Extended Coverage insurance upon the PROJECT to the full insurable value thereof for the benefit of the OWNER, the CONTRACTOR, and SUBCONTRACTORS as their interest may appear. This provision shall in no way release the CONTRACTOR or CONTRACTOR'S surety from obligations under the CONTRACT DOCUMENTS to fully complete the PROJECT.
- 16.4 The CONTRACTOR shall procure and maintain, at his own expense, during the CONTRACT TIME, in accordance with the provisions of the laws of the state in which the work is performed, Workmen's Compensation Insurance, including occupational disease provisions, for all of his employees at the site of the PROJECT and in case any work is sublet, the CONTRACTOR shall require such SUBCONTRACTOR similarly to provide Workmen's Compensation Insurance, including occupational disease provisions for all of the latter's employees unless such employees are covered by the protection afforded by the CONTRACTOR. In case any class of employees engaged in hazardous work under this contract at the site of the PROJECT is not protected under Workmen's Compensation statute, the CONTRACTOR shall provide, and shall cause each SUBCONTRACTOR to provide, adequate and suitable insurance for the protection of his employees not otherwise protected.
- 16.5 The CONTRACTOR shall secure, if applicable, "All Risk" type Builder's Risk Insurance for WORK to be performed. Unless specifically authorized by the OWNER, the amount of such insurance shall not be less than the CONTRACT PRICE totaled in the BID. The policy shall cover not less than the losses due to fire, explosion, hail, lightning, vandalism, malicious mischief, wind, collapse, riot, aircraft, and smoke during the CONTRACT TIME, and until the WORK is accepted by the OWNER. The policy shall name as the insured the CONTRACTOR, the ENGINEER, and the OWNER.
17. INDEMNIFICATION
- 17.1 The CONTRACTOR will indemnify and hold harmless the OWNER and the ENGINEER and their agents and employees from and against all claims, damages, losses and expenses including attorney's fees arising out of or resulting from the performance of the WORK, provided that any such claims, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property including the loss of use resulting therefrom; and is caused in whole or in part by any negligent or willful act or omission of the CONTRACTOR, and SUBCONTRACTOR, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable.
- 17.2 In any and all claims against the OWNER or the ENGINEER, or any of their agents or employees, by any employee of the CONTRACTOR, any SUBCONTRACTOR, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, the indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the CONTRACTOR or any SUBCONTRACTOR under workmen's compensation acts, disability benefit acts or other employee benefits acts.
- 17.3 The obligation of the CONTRACTOR under this paragraph shall not extend to the liability of the ENGINEER, his agents or employees arising out of the preparation or approval of maps, DRAWINGS, opinions, reports, surveys, CHANGE ORDERS, designs or SPECIFICATIONS.

18. CONTRACT SECURITY

- 18.1 The CONTRACTOR shall within ten (10) days after the receipt of the NOTICE OF AWARD furnish the OWNER with a Performance Bond and a Payment Bond in penal sums equal to the amount of the CONTRACT PRICE, conditioned upon the performance by the CONTRACTOR of all undertakings, covenants, terms, conditions and agreements of the CONTRACT DOCUMENTS, and upon the prompt payment by the CONTRACTOR to all persons supplying labor and materials in the prosecution of the WORK provided by the CONTRACT DOCUMENTS. Such BONDS shall be executed by the CONTRACTOR and a corporate bonding company licensed to transact such business in the state in which the WORK is to be performed. The expense of these BONDS shall be borne by the CONTRACTOR. If at any time a surety on any such BOND is declared as bankrupt or loses its right to do business in the state in which the WORK is to be performed, the CONTRACTOR shall within ten (10) days after notice from the OWNER to do so, substitute an acceptable BOND (or BONDS) in such form and sum and signed by such other surety or sureties as may be satisfactory to the OWNER. The premiums on such BOND shall be paid by the CONTRACTOR. No further payments shall be deemed due nor shall be made until the new surety or sureties shall have furnished an acceptable BOND to the OWNER.

19. ACCIDENT PREVENTION AND SAFETY PROGRAM

- 19.1 The CONTRACTOR shall be solely and completely responsible for conditions of the jobsite, including safety of all persons, including employees, and property during performance of the work. This requirement shall apply continuously and not be limited to normal working hours. Safety provisions shall conform to U.S. Department of Labor (OSHA), and all other applicable Federal, State, County, and local laws, ordinances, codes, the requirements set forth below, and any regulations that may be detailed in other parts of these documents. Where any of these are in conflict, the more stringent requirement shall be followed. The CONTRACTOR's failure to thoroughly familiarize himself with the aforementioned safety provisions shall not relieve him from compliance with the obligations and penalties set forth herein.
- 19.2 The OWNER or his Representative will notify the CONTRACTOR of any observed non-compliance with the foregoing provisions and the action to be taken. The CONTRACTOR shall, upon receipt of such notice, immediately take corrective action. If the CONTRACTOR fails or refuses to comply promptly, the OWNER may issue an order stopping all or part of the WORK until satisfactory corrective action has been taken. No part of the time lost due to any such stop orders shall be made the subject of claims for extension of time, or for excess costs or damages by the CONTRACTOR.
- 19.3 The CONTRACTOR shall develop and maintain for the duration of this Contract, a safety program that will effectively incorporate and implement all required safety provisions. The CONTRACTOR shall appoint an employee who is qualified and authorized to supervise and enforce compliance with the safety program.
- 19.4 The CONTRACTOR as a part of his safety program, shall maintain at his office or other well-known place at the jobsite, safety equipment applicable to the WORK as prescribed by the aforementioned authorities, all articles necessary for giving first aid to the injured, and shall establish the procedure for the immediate removal to a hospital or a doctor's care of persons who may be injured on the jobsite.
- 19.5 If death or serious injuries or serious damages are caused, the accident shall be reported immediately by telephone or messenger to both the ENGINEER and OWNER. In addition, the CONTRACTOR must promptly report in writing to appropriate authorities and the OWNER's representative all accidents whatsoever arising out of, or in connection with, the performance of the WORK whether on, or adjacent to, the site, giving full details and statements of witnesses. If a claim is made by anyone against the CONTRACTOR or any subcontractor on account of any accident, the CONTRACTOR shall promptly report the facts in writing to the OWNER giving full details of the claim.
- 19.6 The CONTRACTOR shall provide, erect, and maintain all necessary barricades, suitable and sufficient lights, danger signals, signs and other traffic control devices, and shall take all necessary precautions for the protection of the WORK and safety of the public. Highways closed to traffic shall be protected by effective barricades, and obstructions shall be illuminated during the hours of darkness. Suitable warning signs shall be provided to control and direct traffic properly. The CONTRACTOR shall erect warning signs in advance of any place on the project where operations

may interfere with the use of the road by traffic, and at all intermediate points where the new work crosses or coincides with an existing road.

- 19.7 Compliance with the requirements of this provision by subcontractors will be the responsibility of the CONTRACTOR.

20. TEMPORARY SANITARY FACILITIES

- 20.1 The CONTRACTOR shall provide and maintain necessary sanitary conveniences for the use of those employed on or about the WORK, properly secluded from public observation in such a manner and at such points as shall be approved by the OWNER's representative, and their use shall be strictly enforced.

21. SUPERVISION BY CONTRACTOR

- 21.1 The CONTRACTOR will supervise and direct the WORK. He will be solely responsible for the means, methods, techniques, sequences and procedures of construction. The CONTRACTOR will employ and maintain on the WORK a qualified supervisor or superintendent who shall have been designated in writing by the CONTRACTOR as the CONTRACTOR'S representative at the site. The supervisor shall have full authority to act on behalf of the CONTRACTOR and all communications given to the supervisor shall be as binding as if given to the CONTRACTOR. The supervisor shall be present on the site at all times as required to perform adequate supervision and coordination of the WORK.

22. SUBCONTRACTING

- 22.1 The CONTRACTOR may utilize the services of specialty SUBCONTRACTORS on those parts of the WORK which, under normal contracting practices, are performed by specialty SUBCONTRACTORS.
- 22.2 The CONTRACTOR must perform at least thirty three (33%) of the total amount of the WORK using the CONTRACTOR's own work force and equipment. The CONTRACTOR shall not award WORK to SUBCONTRACTOR(s), in excess of sixty seven (67%) percent of the CONTRACT PRICE, without prior written approval of the OWNER.
- 22.3 The CONTRACTOR shall be fully responsible to the OWNER for the acts and omissions of his SUBCONTRACTORS, and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him.
- 22.4 The CONTRACTOR shall cause appropriate provisions to be inserted in all subcontracts relative to the WORK to bind SUBCONTRACTORS to the CONTRACTOR by the terms of the CONTRACT DOCUMENT insofar as applicable to the WORK of SUBCONTRACTORS and to give the CONTRACTOR the same power as regards terminating any subcontract that the OWNER may exercise over the CONTRACTOR under any provision of the CONTRACT DOCUMENTS.
- 22.5 Nothing contained in this CONTRACT shall create any contractual relation between any SUBCONTRACTOR and the OWNER.
23. SEPARATE CONTRACTS
- 23.1 The OWNER reserves the right to let other contracts in connection with this PROJECT. The CONTRACTOR shall afford other CONTRACTORS reasonable opportunity for the introduction and storage of their materials and the execution of their WORK, and shall properly connect and coordinate his WORK with theirs. If the proper execution or results of any part of the CONTRACTOR'S WORK depends upon the WORK of any other CONTRACTOR, the CONTRACTOR shall inspect and promptly report to the ENGINEER any defects in such WORK that render it unsuitable for such proper execution and results.
- 23.2 The OWNER may perform additional WORK related to the PROJECT by himself, or he may let other contracts containing provisions similar to these. The CONTRACTOR will afford the other CONTRACTORS who are parties to such Contracts (or the OWNER, if he is performing the additional WORK himself), reasonable opportunity for the introduction and storage of materials and equipment and the execution of WORK, and shall properly connect and coordinate his WORK with theirs.

- 23.3 If the performance of additional WORK by other CONTRACTORS or the OWNER is not noted in the CONTRACT DOCUMENTS prior to the execution of the CONTRACT, written notice thereof shall be given to the CONTRACTOR prior to starting any such additional WORK. If the CONTRACTOR believes that the performance of such additional WORK by the OWNER or others involves him in additional expense or entitles him to an extension of the CONTRACT TIME, he may make a claim therefor as provided in Sections 30 and 31.
24. TIME FOR COMPLETION AND LIQUIDATED DAMAGES
- 24.1 The TIME FOR COMPLETION of the WORK is an essential condition of the CONTRACT DOCUMENTS. The TIME FOR COMPLETION appears in the Special Provisions. The WORK embraced shall be commenced on a date specified in the NOTICE TO PROCEED.
- 24.2 The CONTRACTOR will proceed with the WORK at such rate of progress to insure full completion within the TIME FOR COMPLETION. It is expressly understood and agreed, by and between the CONTRACTOR and the OWNER, that TIME FOR COMPLETION of the WORK under the CONTRACT is a reasonable time, taking into consideration the average climatic and economic conditions and other factors prevailing in the locality of the WORK.
- 24.3 If the CONTRACTOR shall fail to complete the WORK within the TIME FOR COMPLETION, or extension of time granted by the OWNER, then the CONTRACTOR will pay to the OWNER the amount for liquidated damages as specified in the Special Provisions for each calendar day that the work shall be incomplete after the date established by the TIME FOR COMPLETION.
- 24.4 The CONTRACTOR shall not be charged with liquidated damages or any excess cost when the delay in completion of the WORK is due to the following, and the CONTRACTOR has promptly given WRITTEN NOTICE of such delay to the OWNER or ENGINEER.
- 24.4.1 To any preference, priority or allocation order duly issued by the OWNER.
- 24.4.2 To unforeseeable causes beyond the control and without the fault or negligence of the CONTRACTOR, including but not restricted to, acts of God, or of the public enemy, acts of the OWNER, acts of another CONTRACTOR in the performance of a contract with the OWNER, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and abnormal and unforeseeable weather; and
- 24.4.3 To any delays of SUBCONTRACTORS occasioned by any of the causes specified in paragraphs 24.4.1 and 24.4.2 of this article.
25. PROGRESS SCHEDULES AND REQUIREMENTS FOR COMPLIANCE
- 25.1 The CONTRACTOR shall within 10 days of receipt of NOTICE TO PROCEED, submit to the OWNER through the ENGINEER for approval a practicable schedule, showing the order in which the CONTRACTOR proposes to carry on the WORK, the dates on which he will start the major items of work (including procurement of materials, plant and equipment) and the contemplated dates for completing the same. The schedule shall be prepared on the form entitled "Contract Progress Schedule," a copy of which is included in the contract.
- 25.2 If, in the opinion of the OWNER, the CONTRACTOR falls behind the progress schedule, the CONTRACTOR shall take such steps as may be necessary to assure performance within the allowable TIME FOR COMPLETION. The CONTRACTOR may propose for approval by the OWNER measures such as increasing number of workers, number of shifts, or overtime operations, days of work, or the amount of construction plant, or all of them. The OWNER may require the CONTRACTOR to submit for approval such supplementary schedule or schedules necessary to demonstrate that the WORK shall be performed within the allowable TIME FOR COMPLETION, all without additional cost to the OWNER.
- 25.3 Failure of the CONTRACTOR to comply with the requirements of this provision shall be grounds for determination that the CONTRACTOR is not prosecuting the work with such diligence as will insure completion within the specified TIME FOR COMPLETION. Upon such determination the OWNER may terminate the CONTRACTOR's right to proceed with the WORK, or any separable part thereof in accordance with Section 27 entitled "Suspension of Work, Termination and Delay".

26. LAND AND RIGHTS-OF-WAY

- 26.1 Prior to issuance of NOTICE TO PROCEED, the OWNER shall obtain all land and rights-of-way necessary for carrying out and for the completion of the WORK to be performed pursuant to the CONTRACT DOCUMENTS, unless otherwise mutually agreed.
- 26.2 The OWNER shall provide to the CONTRACTOR information which delineates and describes the lands owned and rights-of-way acquired.
- 26.3 The CONTRACTOR shall provide at his own expense and without liability to the OWNER any additional land and access thereto that the CONTRACTOR may desire for temporary construction facilities, or for storage of materials.

27. SUSPENSION OF WORK, TERMINATION AND DELAY

- 27.1 The OWNER may suspend the WORK or any portion thereof for a period of not more than ninety (90) days or such further time as agreed upon by the CONTRACTOR, by WRITTEN NOTICE to the CONTRACTOR and the ENGINEER which notice shall fix the date on which WORK shall be resumed. The CONTRACTOR will resume that WORK on the date so fixed. The CONTRACTOR will be allowed an increase in the CONTRACT PRICE or an extension of the CONTRACT TIME, or both, directly attributable to any suspension.
- 27.2 If the CONTRACTOR is adjudged as bankrupt or insolvent, or if he makes a general assignment for the benefit of his creditors or if a trustee or receiver is appointed for the CONTRACTOR or for any of his property, or if he files a petition to take advantage of any debtor's act, or to reorganize under the bankruptcy or applicable laws, or if he repeatedly fails to supply sufficient skilled workmen or suitable materials or equipment, or if he repeatedly fails to make prompt payments to SUBCONTRACTORS or for labor, materials or equipment or if he disregards laws, ordinances, rules, regulations or orders of any public body having jurisdiction of the WORK or if he disregards the authority of the ENGINEER, or if he otherwise violates any provision of the CONTRACT DOCUMENTS then the OWNER may, without prejudice to any other right or remedy and after giving the CONTRACTOR and his surety a minimum of ten (10) days from delivery of a WRITTEN NOTICE, terminate the services of the CONTRACTOR and take possession of the PROJECT and of all materials, equipment, tools, construction equipment and machinery thereon owned by the CONTRACTOR, and finish the WORK by whatever method he may deem expedient. In such case the CONTRACTOR shall not be entitled to receive any further payment until the WORK is finished. If the unpaid balance of the CONTRACT PRICE exceeds the direct and indirect costs of completing the PROJECT, including compensation for additional professional services, such excess SHALL BE PAID TO THE CONTRACTOR. If such costs exceed such unpaid balance, the CONTRACTOR will pay the difference to the OWNER. Such costs incurred by the OWNER will be determined by the ENGINEER and incorporated in a CHANGE ORDER.
- 27.3 Where the CONTRACTOR'S services have been so terminated by the OWNER, said termination shall not affect any right of the OWNER against the CONTRACTOR then existing or which may thereafter accrue. Any retention or payment of monies by the OWNER due the CONTRACTOR will not release the CONTRACTOR from compliance with the CONTRACT DOCUMENTS.
- 27.4 After ten (10) days from delivery of a WRITTEN NOTICE to the CONTRACTOR and the ENGINEER, the OWNER may without cause and without prejudice to any other right or remedy, elect to abandon the PROJECT and terminate the CONTRACT. In such case, the CONTRACTOR shall be paid for all WORK executed and any expense sustained plus reasonable profit. If this contract is terminated by the OWNER without cause, the rights, duties, and obligations of the parties, including compensation to the CONTRACTOR, shall be in accordance with Part 49 of the Federal Acquisition Regulation in effect on the date of this contract.
- 27.5 If, through no act or fault of the CONTRACTOR, the WORK is suspended for a period of more than ninety (90) days by the OWNER or under an order of court or other public authority, or the ENGINEER fails to act on any request for payment within thirty (30) days after it is submitted, or the OWNER fails to pay the CONTRACTOR substantially the sum approved by the ENGINEER or awarded by arbitrators within thirty (30) days of its approval and presentation, then the CONTRACTOR may, after ten (10) days from delivery of a WRITTEN NOTICE to the OWNER and the ENGINEER, terminate the CONTRACT and recover from the OWNER payment for all WORK executed and all expenses sustained. In addition and in lieu of terminating the CONTRACT, if the ENGINEER has failed to act on a request for payment or if the OWNER has failed to make any payment as aforesaid, the CONTRACTOR may upon ten (10) days WRITTEN

NOTICE to the OWNER and the ENGINEER stop the WORK until he has been paid all amounts then due, in which event and upon resumption of the WORK, CHANGE ORDERS shall be issued for adjusting the CONTRACT PRICE or extending the CONTRACT TIME or both to compensate for the costs and delays attributable to the stoppage of the WORK.

- 27.6 If the performance of all or any portion of the WORK is suspended, delayed, or interrupted as a result of a failure of the OWNER or ENGINEER to act within the time specified in the CONTRACT DOCUMENTS, or if no time is specified, within a reasonable time, an adjustment in the CONTRACT PRICE or an extension of the CONTRACT TIME, or both, shall be made by CHANGE ORDER to compensate the CONTRACTOR for the costs and delays necessarily caused by the failure of the OWNER or ENGINEER.

28. INSPECTION AND TESTING

- 28.1 All materials and equipment used in the construction of the PROJECT shall be subject to adequate inspection and testing in accordance with generally accepted standards, as required and defined in the CONTRACT DOCUMENTS.

- 28.2 The OWNER shall provide all inspection and testing services not required by the CONTRACT DOCUMENTS.

- 28.3 The CONTRACTOR shall provide at his expense the testing and inspection services required by the CONTRACT DOCUMENTS.

- 28.4 If the CONTRACT DOCUMENTS, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction require any WORK to specifically be inspected, tested, or approved by someone other than the CONTRACTOR, the CONTRACTOR will give the ENGINEER timely notice of readiness. The CONTRACTOR will then furnish the ENGINEER the required certificates of inspection, testing or approval.

- 28.5 Inspections, tests or approvals by the engineer or others shall not relieve the CONTRACTOR from his obligations to perform the WORK in accordance with the requirements of the CONTRACT DOCUMENTS.

- 28.6 The ENGINEER and his representatives will at all times have access to the WORK. In addition, authorized representatives and agents of any participating Federal or state agency shall be permitted to inspect all work, materials, payrolls, records of personnel, invoices of materials, and other relevant data and records. The CONTRACTOR will provide proper facilities for such access and observation of the WORK and also for any inspection, or testing thereof.

- 28.7 If any WORK is covered contrary to the written instructions of the ENGINEER it must, if requested by the ENGINEER, be uncovered for his observation and replaced at the CONTRACTOR'S expense.

- 28.8 If the ENGINEER considers it necessary or advisable that covered WORK be inspected or tested by others, the CONTRACTOR, at the ENGINEER'S request, will uncover, expose or otherwise make available for observation, inspection or testing as the ENGINEER may require, that portion of the WORK in question, furnishing all necessary labor, materials, tools and equipment. If it is found that such WORK is defective, the CONTRACTOR will bear all the expenses of such uncovering, exposure, observation, inspection and testing and of satisfactory reconstruction. If, however, such WORK is not found to be defective, the CONTRACTOR will be allowed an increase in the CONTRACT PRICE or an extension of the CONTRACT TIME, or both, directly attributable to such uncovering, exposure, observation, inspection, testing and reconstruction and an appropriate CHANGE ORDER shall be issued.

29. CORRECTION OF WORK

- 29.1 The CONTRACTOR shall promptly remove from the premises all WORK rejected by the ENGINEER for failure to comply with the CONTRACT DOCUMENTS, whether incorporated in the construction or not, and the CONTRACTOR shall promptly replace and re-execute the WORK in accordance with the CONTRACT DOCUMENTS and without expense to the OWNER and shall bear the expense of making good all WORK of other CONTRACTORS destroyed or damaged by such removal or replacement.

- 29.2 All removal and replacement WORK shall be done at the CONTRACTOR'S expense. If the CONTRACTOR does not take action to remove such rejected WORK within ten (10) days after receipt of WRITTEN NOTICE, the OWNER may remove such WORK and store the materials at the expense of the CONTRACTOR.
30. CHANGES IN THE WORK
- 30.1 The OWNER may at any time, as the need arises, order changes within the scope of the WORK without invalidating the Agreement. If such changes increase or decrease the amount due under the CONTRACT DOCUMENTS, or in the time required for performance of the WORK, an equitable adjustment shall be authorized by CHANGE ORDER.
- 30.2 The ENGINEER, also, may at any time, by issuing a FIELD ORDER, make changes in the details of the WORK. The CONTRACTOR shall proceed with the performance of any changes in the WORK so ordered by the ENGINEER unless the CONTRACTOR believes that such FIELD ORDER entitles him to a change in CONTRACT PRICE or TIME, or both, in which event he shall give the ENGINEER WRITTEN NOTICE thereof within seven (7) days after the receipt of the ordered change. Thereafter the CONTRACTOR shall document the basis for the change in CONTRACT PRICE or TIME within thirty (30) days. The CONTRACTOR shall not execute such changes pending the receipt of an executed CHANGE ORDER or further instruction from the OWNER.
31. CHANGES IN CONTRACT PRICE
- 31.1 The CONTRACT PRICE may be changed only by a CHANGE ORDER. The value of any WORK covered by a CHANGE ORDER or of any claim for increase or decrease in the CONTRACT PRICE shall be determined by one or more of the following methods in the order of precedence listed below:
- a. Unit prices previously approved.
 - b. An agreed lump sum.
 - c. The actual cost for labor, direct overhead, materials, supplies, equipment, and other services necessary to complete the work. In addition there shall be added an amount to be agreed upon but not to exceed fifteen (15) percent of the actual cost of the WORK to cover the cost of general overhead and profit.
32. DIFFERING SITE CONDITIONS
- 32.1 The CONTRACTOR shall promptly, and before such conditions are disturbed, except in the event of an emergency, notify the OWNER by WRITTEN NOTICE of:
- 32.1.1 Subsurface or latent physical conditions at the site differing materially from those indicated in the CONTRACT DOCUMENTS; or
- 32.1.2 Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in WORK of the character provided for in the CONTRACT DOCUMENTS.
- 32.2 The OWNER shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or in the time required for, performance of the WORK, an equitable adjustment shall be made and the CONTRACT DOCUMENTS shall be modified by a CHANGE ORDER. Any claim of the CONTRACTOR for adjustment hereunder shall not be allowed unless he has given the required WRITTEN NOTICE; provided that the OWNER may, if he determines the facts so justify, consider and adjust any such claims asserted before the date of final payment.
33. USE AND POSSESSION PRIOR TO COMPLETION
- 33.1 The OWNER shall have the right to take possession of or use any completed or partially completed part of the work. Before taking possession of or using any work, the OWNER shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that the OWNER intends to take possession of or use. However, failure of the OWNER to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. The OWNER's possession or use shall not be deemed an acceptance of any work under the contract.

- 33.2 While the OWNER has such possession or use, the Contractor shall be relieved of the responsibility for the loss of or damage to the work resulting directly from the OWNER'S possession or use. If prior possession or use by the OWNER delays the progress of the work or causes additional expense to the Contractor, an adjustment shall be made in the contract price, the time of completion or both, and the contract shall be modified in writing accordingly.

34. CLEANUP AND FINISH GRADING

- 34.1 The CONTRACTOR shall restore all areas disturbed by construction to a condition at least equal to that existing prior to construction. Excess construction materials, equipment, tools, waste excavation, and rubbish shall be removed. Excavated areas shall be finish graded to provide drainage as required by the drawings and specifications, or in the absence of specific requirements, to provide drainage away from the facilities constructed and to restore original drainage patterns in existence prior to construction and to provide drainage away from excavated areas and installed facilities.

35. MEASUREMENT AND PAYMENT

- 35.1 Completed items of work shall be measured and paid for in accordance with the requirements listed in the Bid Schedule. Payment shall be based on the actual quantities completed and shall represent full compensation under the contract. The price paid for the completed item of work shall include full compensation for furnishing all labor, materials, (other than that furnished by the OWNER), tools, equipment, and performing all work required by the provisions of the contract to furnish and install the item of work, complete in place. In all cases, the finished product shall be a complete, operational system or component. The price for the completed item of work shall also include all applicable state and local sales and other taxes.

36. VARIATION IN ESTIMATED QUANTITIES

- 36.1 If the quantity of a unit-priced item in this CONTRACT is an estimated quantity and the actual quantity of the unit-priced item varies more than 25 percent above or below the estimated quantity, an equitable adjustment in the contract price shall be made upon demand of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 125 percent or below 75 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the CONTRACTOR may request, in writing, an extension of time, to be received by the OWNER within 10 days from the beginning of the delay, or within such further period as may be granted by the OWNER before the date of final settlement of the CONTRACT. Upon the receipt of a written request for an extension, the OWNER shall ascertain the facts and make any appropriate adjustment for extending the completion date.

37. PAYMENTS TO CONTRACTOR

- 37.1 The CONTRACTOR will submit to the ENGINEER a partial payment estimate filled out and signed by the CONTRACTOR covering the WORK performed during the period covered by the partial payment estimate and supported by such data as the ENGINEER may reasonably require. The request for payment may also include an allowance for the cost of such major materials and equipment which are suitably stored either at or near the site. If payment is requested on the basis of materials and equipment not incorporated in the WORK but delivered and suitably stored at or near the site, the partial payment estimate shall also be accompanied by such supporting data, satisfactory to the OWNER, as will establish the OWNER'S title to the material and equipment and protect his interest therein, including applicable insurance. The ENGINEER will, within ten (10) days after receipt of each partial payment estimate, either indicate in writing his approval of payment and present the partial payment estimate to the OWNER, or return the partial payment estimate to the CONTRACTOR indicating in writing his reasons for refusing to approve payment. In the latter case, the CONTRACTOR may make the necessary corrections and resubmit the partial payment estimate. The OWNER will, within twenty (20) days of presentation to him of an approved partial payment estimate, pay the CONTRACTOR a progress payment on the basis of the approved partial payment estimate. The OWNER shall retain ten (10) percent of the amount of each payment until final completion and acceptance of all work covered by the CONTRACT DOCUMENTS. The OWNER at any time, however, after fifty (50) percent of the WORK has been completed, if he finds that satisfactory progress is being made, shall reduce retainage to five (5%) percent on the current and remaining estimates. When the WORK is substantially complete (operational or beneficial occupancy), the retained amount may be further reduced below five (5) percent to only that amount necessary to assure completion. On completion and acceptance of a

part of the WORK on which the price is stated separately in the CONTRACT DOCUMENTS, payment may be made in full, including retained percentages less authorized deductions.

- 37.2 Upon completion and acceptance of the WORK, the ENGINEER shall issue a certificate attached to the final payment request that the WORK has been accepted by him under the conditions of the CONTRACT DOCUMENTS. The entire balance found to be due the CONTRACTOR including the retained percentages, but except such sums as may be lawfully retained by the OWNER, shall be paid to the CONTRACTOR within thirty (30) days of completion and acceptance of the WORK.
- 37.3 The CONTRACTOR will indemnify and save the OWNER or the OWNER'S agents harmless from all claims growing out of the lawful demands of SUBCONTRACTORS, laborers, workmen, mechanics, materialmen, and furnishers of machinery and parts thereof, equipment, tools, and all supplies, incurred in the furtherance of the performance of the WORK. The CONTRACTOR shall at the OWNER'S request, furnish satisfactory evidence that all obligations of the nature designated above have been paid, discharged, or waived. If the CONTRACTOR fails to do so the OWNER may, after having notified the CONTRACTOR, either pay unpaid bills or withhold from the CONTRACTOR'S unpaid compensation a sum of money deemed reasonably sufficient to pay any and all such lawful claims until satisfactory evidence is furnished that all liabilities have been fully discharged whereupon payment to the CONTRACTOR shall be resumed, in accordance with the terms of the CONTRACT DOCUMENTS, but in no event shall the provisions of this sentence be construed to impose any obligations upon the OWNER to either the CONTRACTOR, his Surety, or any third party. In paying any unpaid bills of the CONTRACTOR, any payment so made by the OWNER shall be considered as a payment made under the CONTRACT DOCUMENTS by the OWNER to the CONTRACTOR and the OWNER shall not be liable to the CONTRACTOR for any such payments made in good faith.
- 37.4 If the OWNER fails to make payment thirty (30) days after approval by the ENGINEER, in addition to other remedies available to the CONTRACTOR, there shall be added to each such payment interest at the maximum legal rate commencing on the first day after said payment is due and continuing until the payment is received by the CONTRACTOR.

38. ASSIGNMENTS

- 38.1 Neither the CONTRACTOR nor the OWNER shall sell, transfer, assign or otherwise dispose of the CONTRACT or any portion thereof, or of his right, title or interest therein, or his obligations thereunder, without written consent of the other party.

39. GUARANTY

- 39.1 The CONTRACTOR shall guarantee all materials and equipment furnished and WORK performed for a period of one (1) year from the date of SUBSTANTIAL COMPLETION of the system that the completed system is free from all defects due to faulty materials or workmanship and the CONTRACTOR shall promptly make such corrections as may be necessary by reason of such defects including the repairs of any damage to other parts of the systems resulting from such defects. The OWNER will give notice of observed defects with reasonable promptness. In the event that the CONTRACTOR should fail to make such repairs, adjustments, or other WORK that may be made necessary by such defects, the OWNER may do so and charge the CONTRACTOR the cost thereby incurred. The performance BOND shall remain in full force and effect through the guarantee period.

40. ACCEPTANCE OF FINAL PAYMENT AS RELEASE

- 40.1 The acceptance by the CONTRACTOR of final payment shall be and shall operate as a release to the OWNER of all claims and all liability to the CONTRACTOR other than claims in stated amounts as may be specifically excepted by the CONTRACTOR for all things done or furnished in connection with this WORK and for every act and neglect of the OWNER and others relating to or arising out of this WORK. Any payment, however, final or otherwise, shall not release the CONTRACTOR or his sureties from any obligations under the CONTRACT DOCUMENTS or the performance BOND and Payment BONDS.

41. ENGINEER'S ROLE AND AUTHORITY

- 41.1 The ENGINEER shall act as the OWNER'S representative during the construction period. He shall decide questions which may arise as to quality and acceptability of materials furnished and WORK

performed. He shall interpret the intent of the CONTRACT DOCUMENTS in a fair and unbiased manner. The ENGINEER will make visits to the site and determine if the WORK is proceeding in accordance with the CONTRACT DOCUMENTS.

- 41.2 The CONTRACTOR will be held strictly to the intent of the CONTRACT DOCUMENTS in regard to the quality of materials, workmanship and execution of the WORK. Inspections may be made at the factory or fabrication plant of the source of material supply.
- 41.3 The ENGINEER will not be responsible for the construction means, controls, techniques, sequences, procedures, or construction safety.
- 41.4 The ENGINEER does not have authority to obligate the OWNER to changes in the terms of the CONTRACT without the approval of the OWNER.

42. RESOLUTION OF DISPUTES

- 42.1 All claims, disputes and other matters in question arising out of, or relating to, the CONTRACT DOCUMENTS or the breach thereof, except for claims which have been waived by the making and acceptance of final payment as provided by Section 40, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgement may be entered upon it in any court having jurisdiction thereof.
[Note: An arbitration clause is a waiver of sovereign immunity. The Tribe needs to be aware of this if arbitration clauses are placed in the contract.]
- 42.2 Notice of the demand for arbitration shall be filed in writing with the other party to the CONTRACT DOCUMENTS and with the American Arbitration Association, and a copy shall be filed with the ENGINEER. Demand for arbitration shall in no event be made on any claim, dispute or other matter in question which would be barred by the applicable statute of limitations.
- 42.3 The CONTRACTOR will carry on the WORK and maintain the progress schedule during any arbitration proceedings, unless otherwise mutually agreed in writing.

43. EQUAL EMPLOYMENT OPPORTUNITY

- 43.1 During the performance of this contract, the CONTRACTOR agrees as follows:
 - 43.1.1 The CONTRACTOR shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin.
 - 43.1.2 The CONTRACTOR shall take affirmative action to ensure the applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
 - 43.1.3 The CONTRACTOR agrees to post in conspicuous places available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
 - 43.1.4 The CONTRACTOR shall, in all solicitations or advertisements for employees placed by or on behalf of the CONTRACTOR, state that all qualified applicants shall receive consideration for employment without regard to race, color, religion, sex, or national origin.
 - 43.1.5 The CONTRACTOR shall send, to each labor union or representative of workers with which he/she has a collective bargaining agreement or other contract or understanding, a notice advising the labor union or workers' representative of the CONTRACTOR's commitment under this clause, and post copies of the notice in conspicuous places available to employees and applicants for employment.
 - 43.1.5 The CONTRACTOR shall comply with all provision of Executive Order No. 11246, as amended, and the rules, regulations, and relevant orders of the Secretary of Labor.

- 43.1.6 The CONTRACTOR shall furnish to the OWNER, all information required by Executive Order No. 11246, as amended, and by the rules, regulations, and orders of the Secretary of Labor. Standard Form 100 (EEO - 1), or any successor form, is the prescribed form to be filed within 30 days following the award, unless filed within 12 months preceeding the date of award.
- 43.1.7 The CONTRACTOR shall permit access to its books, records, and accounts by the OWNER or the Office of Federal Contract Programs (OFCCP) for the purposes of investigation to ascertain compliance with the applicable rules, regulations, and orders.
- 43.1.8 If the OFCCP determines that the CONTRACTOR is not in compliance with this clause or any rules, regulations, and orders of the Secretary of Labor, this contract may be cancelled, terminated, or suspended in whole or in part and the CONTRACTOR may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the CONTRACTOR as provided in Executive Order No. 11246, as amended, the rules, regulations, or orders of the Secretary of Labor, or as otherwise provided by law.
- 43.1.9 The CONTRACTOR shall include the terms and conditions of this clause in every SUBCONTRACT or purchase order unless exempted by the rules, regulations, or orders of the Secretary of Labor issued under Executive Order No. 12246, as amended, so that such provisions will be binding upon each SUBCONTRACTOR or vendor.
- 43.1.10 The CONTRACTOR shall take such action with respect to any SUBCONTRACT or purchase order as the OWNER may direct as a means of enforcing these terms and conditions, including sanctions for noncompliance; provided, that if the CONTRACTOR becomes involved in, or is threatened with litigation with a SUBCONTRACTOR or vendor as a result of such direction by the OWNER, the CONTRACTOR may request the OWNER and the United States to enter into such litigation to protect the interests of the United States.
- 43.1.11 Notwithstanding any other clause in this contract, disputes relative to this clause will be governed by the procedures in 41 CFR 60-1.1

44. CLEAN AIR AND WATER

44.1 The CONTRACTOR agrees:

- 44.1.1 To comply with all the requirements of section 114 of the Clean Air Act (42 U.S.C. 7414) and section 308 of the Clean Water Act (33 U.S.C. 1318) relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in section 114 and section 308 of the Clean Air Act and the Clean Water Act, and all regulations and guidelines issued to implement those acts before the award of this contract.
- 44.1.2 That no portion of the WORK required by this prime contract will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities on the date when this contract was awarded unless and until the EPA eliminates the name of the facility from the listing.
- 44.1.3 To use best efforts to comply with clean air standards and clean water standards at the facility in which the contract is being performed.
- 44.1.4 To insert the substance of this clause into any nonexempt SUBCONTRACT, including this subparagraph 44.1.4.

45. INDIAN HEALTH SERVICE

- 45.1 There shall be no contractual relationship either implied or express between the IHS and the CONTRACTOR or any SUBCONTRACTOR at any tier.
- 45.2 IHS representatives shall be afforded access to the site at all times during the construction period to observe the work and determine if the work conforms to the intent of the design.

- 45.3 IHS representatives shall not be responsible for the construction means, controls, techniques, sequences, procedures, or construction safety.
- 45.4 IHS representatives do not have authority to obligate the OWNER to changes in the terms of the CONTRACT nor to act as an agent of the OWNER in any manner. Inspections conducted by IHS representatives shall be for the sole benefit of the IHS and the OWNER and shall not relieve the CONTRACTOR of any contract requirements.

LABOR PROVISIONSI. DAVIS-BACON ACT

- (a) All laborers and mechanics employed or working upon the site of the WORK will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the CONTRACTOR and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (d) of this clause also, regular contributions made or costs incurred for more than a weekly period (but not less than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such period. Such laborers and mechanics shall be paid not less than the appropriate wage rate and fringe benefits in the wage determination for classification of work actually performed without regard to skill, except as provided in the clause entitled "Apprentices" and "Trainees." Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (b) of this clause) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the CONTRACTOR and its subcontractors at the site of the WORK in a prominent and accessible place where it can be easily seen by the workers.
- (b) (1) The OWNER shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The OWNER shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met.
- (i) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
 - (ii) The Classification is utilized in the area by the construction industry; and
 - (iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.
- (2) If the CONTRACTOR and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the OWNER agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the OWNER to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. The Administrator or an approved authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the OWNER or will notify the OWNER within a 30-day period of that additional time is necessary.
- (3) In the event the CONTRACTOR, the laborers or mechanics to be employed in the classification or their representatives, and the OWNER do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the OWNER shall refer the questions, including the views of all interested parties and the recommendation of the OWNER, to the Administrator of the Wage and Hour Division for determination. The Administrator or an authorized representative, will issue a determination within 30 days of receipt and so advise the OWNER or will notify the OWNER within the 30-day period that additional time is necessary.
- (4) The wage rate (including fringe benefits where appropriate) determined pursuant to subparagraphs (b)(2) or (b)(3) of this clause, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.
- (c) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the CONTRACTOR shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

- (d) If the CONTRACTOR does not make payments to a trustee or other third person, the CONTRACTOR may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program. Provided, that the Secretary of Labor has found, upon the written request of the CONTRACTOR, that applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the CONTRACTOR to set aside in a separate account assets for the meeting of obligations under the plan or program.

2. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - OVERTIME COMPENSATION

- (a) Overtime requirements: No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics (See Federal Acquisition Regulation 22.300) shall require or permit any such laborer or mechanic in any workweek in which individual is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.
- (b) Violation, liability for unpaid wages, liquidated damages: In the event of any violation of the provisions set forth in paragraph (a) of this clause, the CONTRACTOR and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, employed in violation of the provisions set forth in paragraph (a) of this clause, in the sum of \$10 for each calendar day for which such individual was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime wages required by the provisions set forth in paragraph (a) of this clause.
- (c) Withholding for unpaid wages and liquidated damages: The Contracting officer shall upon his or her own action or written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the CONTRACTOR or subcontractor under any such contract or any other Contract with the same Prime Contractor, or any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same Prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the provisions set forth in paragraph (b) of this clause.
- (d) Payrolls and basic records:
- (1) The CONTRACTOR or subcontractor shall maintain payrolls and basic payroll records during the course of contract work and shall preserve them for a period of 3 years from the completion of the contract for all laborers and mechanics working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Nothing in this paragraph shall require the duplication of records required to be maintained for construction work by Department of Labor regulations at 29 CFR 5.5(a)(3) implementing the Davis-Bacon Act.
- (2) The records to be maintained under paragraph (d)(1) of this clause shall be made available by the CONTRACTOR or subcontractor for inspection, copying, or transcription by authorized representatives of the OWNER or the Department of Labor. The CONTRACTOR or subcontractor shall permit such representatives to interview employees during working hours on the job.
- (e) Subcontracts: The CONTRACTOR or subcontractor shall insert in any subcontracts the provisions set forth in paragraphs (a) through (d) of this clause and also a clause requiring the subcontractors to include these provisions any lower tier subcontracts. The Prime CONTRACTOR shall be responsible for compliance by any subcontractor or lower tier subcontractor with the provisions set forth in paragraphs (a) through (d) of this clause.

3. APPRENTICES AND TRAINEES

- (a) Apprentices: Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in

the Program but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeyman on the job site in any craft classification shall not be greater than the ratio permitted to the CONTRACTOR as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in this paragraph shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentices' level of progress, expressed as percentage of the journeyman hourly rate specified in the applicable wage determination. Apprentices shall be paid fringes in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringe benefits shall be paid in accordance with that determination.

In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the CONTRACTOR will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

- (b) Trainees: Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employee and Training Administration withdraws approval of a training program, the CONTRACTOR will not longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.
- (c) Equal Employment Opportunity: The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

4. PAYROLLS AND BASIC RECORDS

- (a) Payrolls and basic records relating thereto shall be maintained by the CONTRACTOR during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the WORK. Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates or wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deduction made and actual wages paid. Whenever the Secretary of Labor has found under paragraph (d) of the clause entitled "Davis-Bacon Act" that the wages of any Laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the CONTRACTOR shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual costs incurred in

providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

- (b) (1) The CONTRACTOR shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the OWNER. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under paragraph (a) of this clause. The information may be submitted in any form desired. Optional Form WH-347 Federal stock number 029-005-00014-1 is available for this purpose and may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The Prime Contractor is responsible for the submission of copies of payrolls by all subcontractors.
- (2) Each payroll submitted shall be accompanied by a "Statement of Compliance" signed by the CONTRACTOR or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:
- (i) That the payroll for the payroll period contains the information required to be maintained under paragraph (a) of this clause entitled "Payrolls and Basic Records" and that such information is correct and complete.
 - (ii) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deduction as set forth in Regulations, 29 CFR Part 3 and
 - (iii) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.
- (3) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by subparagraph (b)(2) of this clause.
- (4) The falsification of any of the certifications may subject the CONTRACTOR or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 18 and Section 231 of Title 31 of the United States Code.
- (c) The CONTRACTOR or subcontractor shall make the records required under paragraph (a) of this clause available for inspection, copying, or transcription by authorized OWNER or representatives of the OWNER or the Department of Labor. The CONTRACTOR or subcontractor shall permit the OWNER or representatives of the OWNER or the Department of Labor to interview employees during working hours on the job. If the CONTRACTOR or subcontractor fails to submit the required records or to make them available, the OWNER may, after written notice to the CONTRACTOR, sponsor take such action as may be necessary to cause the suspension of any further payment. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

5. COMPLIANCE WITH COPELAND ACT REQUIREMENTS

The CONTRACTOR shall comply with the requirements of 29 CFR Part 3, which are incorporated by reference in this contract.

6. WITHHOLDING OF FUNDS

The OWNER shall upon his or her own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the CONTRACTOR under this contract or any other Federal contract with the same Prime Contractor, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirement, which is held by the same Prime CONTRACTOR, so much of the accrued payment or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the CONTRACTOR or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of WORK, all or part of the wages required by the contract, the OWNER may, after written notice to

the CONTRACTOR, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

7. SUBCONTRACTS (LABOR STANDARDS)

- (a) The CONTRACTOR or subcontractor shall insert in any subcontracts the clauses entitled "Davis-Bacon Act," "Contract Work Hours and Safety Standards Act Overtime Compensation," "Apprentice and Trainees," "Payrolls and Basic Records," "Compliance With Copeland Act Requirements," "Withholding of Funds," "Subcontracts (Labor Standards)," "Contract Termination: Debarment," "Disputes Concerning Labor Standards," "Compliance with Davis-Bacon and Related Act Requirements," and "Certification of Eligibility," and such other clauses as the OWNER may by appropriate instruction require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The Prime Contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses cited in this paragraph.
- (b) (1) Within 14 days after of the contract, the CONTRACTOR shall deliver to the OWNER a completed Statement and Acknowledgment Form (SF-1413) for each subcontract, including the subcontractor's signed and dated acknowledgment that the clauses set forth in paragraph (a) of this clause have been included in the subcontract.
- (2) Within 14 days after the award of any subsequently awarded subcontract the CONTRACTOR shall deliver to the OWNER an updated completed SF 1413 for such additional subcontract.

8. CONTRACT TERMINATION: DEBARMENT

A breach of the contract clauses entitled "Davis-Bacon Act," "Contract Work Hours and Safety Standards Act-Overtime Compensation," "Apprentices and Trainees," "Payrolls and Basic Records," "Compliance with Copeland Act Requirements," Subcontracts," (Labor Standards) "Compliance with Davis-Bacon and Related Act Requirements," and "Certification of Eligibility" may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

9. DISPUTES CONCERNING LABOR STANDARDS

The United States Department of Labor has set forth in 29 CFR Parts 5, 6, and 7 procedures for resolving disputes concerning labor standards requirements. Such disputes shall be resolved in accordance with the procedures and not the Disputes clause of this Contract. Disputes within the meaning of this clause include disputes between the CONTRACTOR (or any of its subcontractors) and the OWNER, the U.S. Department of Labor, or the employees or their representatives.

10. COMPLIANCE WITH THE DAVIS-BACON AND RELATED ACT REQUIREMENTS

All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this contract.

11. CERTIFICATION OF ELIGIBILITY

- (a) By entering into this contract, the CONTRACTOR certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government assisted contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).
- (b) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government assisted contract by virtue of Section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).
- (c) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.80

SPECIAL PROVISIONS

This section is used to clarify or add supplemental material to the General Conditions including modifications to the General Conditions, addressing non-technical and unique issues that could affect the work; local, city, county, or tribal requirements; TERO, taxes, labor pools, subcontractor lists, and contacts for tribal procurement of local inspections; local warrantee, bonding, insurance, or licensing requirements. Other relevant issues include availability of electricity, water, and other utilities; site access, rights-of-way, and peculiar site or access conditions. Special provisions may include:

SP-01	Pre-Bid Conference
SP-02	Commencement, Prosecution, and Completion Work
SP-03	Days of Work and Hours of Work
SP-04	Liquidated Damages
SP-05	Contract Documents
SP-06	Submittal Requirements
SP-07	Preconstruction Conference and Projects Meetings
SP-08	Final Inspection
SP-09	Order of Precedence

1. PRE-BID CONFERENCE

A Pre-Bid Conference will be held on _____ at _____. The conference will begin at _____, local time.

The Pre-Bid conference will provide prospective bidders an opportunity to inquire about and clarify various elements of the scope of work, CONTRACTOR procedures and obligations or any other items which a CONTRACTOR would like to discuss.

All explanations, suggestions, interpretations, clarifications, and changes made at the conference are not considered official and will not be enforceable or binding unless and until set forth in an Amendment to the solicitation.

Failure to visit the site will not relieve the CONTRACTOR from the requirement to furnish all materials and perform all job necessary to complete the WORK in strict compliance with the CONTRACT.

2. COMMENCEMENT, PROSECUTION, AND COMPLETION OF WORK

Prior to commencing work on this CONTRACT, the CONTRACTOR shall be required to participate in a pre-construction conference with the OWNER and PROJECT ENGINEER if the OWNER so chooses. The purpose of this conference will be to discuss the authorities, duties, and responsibilities of parties involved and to plan operating procedures mutually satisfactory to those involved. It will also present an opportunity to resolve any questions regarding performance under the CONTRACT which have not been previously resolved.

To enable orderly review of progress during construction and to provide for systematic discussion of problems, the Project Engineer may conduct project meetings throughout the construction period. In general, project meetings may be held monthly in accordance with a mutually acceptable schedule. The purpose of the meetings is to analyze problems that might arise relative to execution of the work. Persons designated by the Contractor to attend and participate in project meetings shall have all the required authority to commit the Contractor to solutions as agreed upon in the project meetings. To the maximum extent practicable, project meetings shall be held at the job site.

The CONTRACTOR shall be required to commence work under this CONTRACT within _____ calendar days after the date of receipt of the Notice to Proceed, to prosecute the work diligently, and to complete all required work not later than _____ calendar days after receipt of the Notice to Proceed.

3. DAYS OF WORK AND HOURS OF WORK

Construction work will not be permitted on Saturdays, Sundays, nor on New Year's Day, President's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day, nor any other holidays declared by the OWNER. When any of the above holidays falls on Saturday and the preceding Friday is established as a holiday or when any of the above holidays fall on Sunday and the Monday following that day is established as a holiday, no construction will be permitted on those days. However, the ENGINEER, when in his opinion it is justified, may grant the

CONTRACTOR permission to work on any of the above days upon written application by the CONTRACTOR in advance.

Regular work shifts shall be eight (8) hours daily Monday through Friday, except on holidays indicated above. Time of beginning and ending the day's work shall be approved by the OWNER'S representative. Approval shall be requested in writing at least 48 hours in advance. When for good reason short periods of overtime work are required, the OWNER'S representative may give approval without advance written notice.

4. LIQUIDATED DAMAGES

Liquidated Damages will be assessed in the amount of \$_____.00 per day for each calendar day of delay beyond the TIME FOR COMPLETION stated in the CONTRACT, or any extension thereof that may be granted pursuant to the terms of the CONTRACT, until the work is determined by the OWNER to be substantially complete.

5. CONTRACT DOCUMENTS

A maximum of 6 sets of CONTRACT drawings and specifications will be furnished without charge to the CONTRACTOR at award of this contract, except applicable publications incorporated by reference which will be furnished on request at the cost of reproduction.

6. SUBMITTAL REQUIREMENTS

The CONTRACTOR shall furnish material submittals, design submittals, shop drawings, operation and maintenance manuals, and as-built drawings in accordance with the requirements detailed in Schedule F, Contract Submittal Requirements.

7. PRE-CONSTRUCTION CONFERENCE AND PROJECT MEETINGS

Prior to commencing work on this contract, the CONTRACTOR shall be required to participate in a pre-construction conference with the OWNER, ENGINEER, and other representatives designated by the OWNER. The purpose of this conference will be to discuss the authorities, duties, and responsibilities of parties involved and to plan operating procedures mutually satisfactory to those involved. It will also present an opportunity to resolve any questions regarding performance under the contract which have not been previously resolved.

8. MAINTENANCE OF UTILITIES AND SITE FACILITIES

The CONTRACTOR is responsible to determine the exact location of any and all utilities not specifically located on the plans and to protect them from damage during construction. Should any utility be damaged or disturbed, the CONTRACTOR shall immediately notify the Project ENGINEER and the OWNER of the damaged utility. Any and all damage that results from work under the contract shall be promptly repaired at the expense of the CONTRACTOR.

During the progress of work, the CONTRACTOR shall protect all existing vegetation, structures, sidewalks, streets, mailboxes, ditches, culverts, signposts, fences, driveways, and similar items. If the CONTRACTOR must remove or disturb these facilities, provision shall be made to maintain a temporary facility serving the same purpose as that which it was intended to replace. Damage caused by the CONTRACTOR'S negligence, over excavation or any of the Contractor's operations to vegetation, structures, sidewalks, streets, mailboxes, ditches, culverts, signposts, fences, driveways and similar items shall be promptly restored at the CONTRACTOR'S expense. Upon completion of the work, the CONTRACTOR shall restore all such facilities to a condition at least equal to that existing prior to construction. The CONTRACTOR shall not obstruct access to the site.

The CONTRACTOR shall perform his work at all times in a manner to ensure minimal obstruction to traffic and minimal inconvenience to the general public.

9. NOTIFICATION, INSPECTION, AND FINAL INSPECTION

The CONTRACTOR shall keep the Project ENGINEER notified and advised of all work to be done or work in progress sufficiently in advance so that proper inspection can be performed.

Request for final inspection shall be submitted in writing by the CONTRACTOR to the OWNER at least 5 days prior to the requested date of final inspection to allow sufficient preparation and scheduling of Owner's representatives.

The CONTRACTOR may be charged with additional cost of re-inspection when the work is not ready at the time specified by the Contractor and re-inspected or re- test is necessary.

10. ORDER OF PRECEDENCE

In the event of an inconsistency between provisions of this contract, the inconsistency shall be resolved by giving precedence in the following order:

- 1) Bid Schedule (Schedule A) and Terms and Conditions of Contract.
- 2) Written bid instructions.
- 3) General Conditions, Schedule B.
- 4) Special Provisions, Schedule D.
- 5) Exhibits and other provisions of the contract, where incorporated by reference or otherwise, Schedule E.
- 6) Submittals, Schedule F.
- 7) Technical Provisions, Schedule G.
- 8) Drawings, Schedule H.

(Insert Exhibits Here)

CONTRACT SUBMITTAL REQUIREMENTS

[Change the number of copies and number of days listed below to meet the needs of the Area. Consider requesting submittal of data files on CDs or floppy disks of the final documents and drawings in addition to the hard copies with a stipulation that the hard copies are the official submittals.]

1. Material Submittals.

The Contractor shall furnish to the Project Engineer 5 copies of all material submittals listed on the "Submittal Review Form". All material submittals or resubmittals shall be accompanied by and furnished in accordance with this "Submittal Review Form". The location of the specification for each of these items in the Technical Provisions is indicated on this form. If the item description for the material submittal is not the exact brand or model specified by the Owner, then 5 copies of the manufacturer's descriptive literature, catalog cut-sheets, etc., must also be included with the submittal.

The contractor shall clearly indicate on all material submittals and copies, the submittal review form item number, and the exact item selected. In all cases, the Contractor shall enter the exact brand and model on the "Submittal Review Form" for that particular item.

All material submittals shall be submitted within 10 days after receipt of Notice to Proceed. The Contractor should allow 10 days from receipt by the Project Engineer for review and approval or rejection by the Owner. For each material resubmittal required, the Contractor should allow an additional 5 days from date of receipt by the Project Engineer for review and approval or rejection by the Owner.

2. Design Submittals

Five copies of all design submittals and related shop drawings are required. Shop drawings and electrical schematic details shall be of the size 24" x 36" with one copy on reproducible Mylar. Each design submittal or resubmittal and related shop drawings shall be listed on the "Submittal Review Form" by the contractor with an appropriate reference to the attachments submitted. All design submittals shall be stamped by a Professional Engineer registered in the State of _____.

All design submittals are required within 14 days after receipt of Notice to Proceed. The Contractor should allow 10 days from receipt by the Project Engineer for review and approval or rejection by the Owner. For each design resubmittal required, the Contractor should allow an additional 10 days from date of receipt by the Project Engineer for review and approval or rejection by the Owner.

Example--Design Submittal Required

- a. TP 46.0, Control System. The submittal shall include all of the following items:
 - i. Manufacturer's name and model number of all components of the control system, and product data sheets for all components.
 - ii. Electrical schematic (ladder) diagram, on a reproducible, 24" x 36" mylar, of the control system showing all circuits and control components in symbolic form using standard symbols. The diagram shall include a legend which explains all symbols.
 - iii. Outline dimension and general physical arrangement drawings of each enclosure and panel board.
- b. TP 40.0 Provision of Temporary Water Service. The submittal shall include the following items:
 - i. General description of proposed methods including pipe sizing, materials and routing for the water mains and house services.
 - ii. Estimate of the amount of time and number of services to be served by temporary water service.
 - iii. Explanation of chlorination procedures and materials for temporary water service lines.
- c. TP 50.0 Degasifier. The submittal shall include the following items:
 - i. Preliminary sizing and performance information including height, diameter, flow rates, expected percentage of CO2 removal, flow schematic, and size and capacity of blower motor and cable.
 - ii. Preliminary drawings and technical information indicating construction materials, manufacturer, access to interior, inlet-outlet piping, and blower, vent, demisting, and tray assemblies.
 - iii. Plan and schedule for completing final sizing, delivery, and installation process.
- d. SP-16 Signing and Traffic Plan. The submittal shall include the following:
 - i. Signing plan showing the necessary construction signing flagmen and barricades required for this project.

2. Operation and Maintenance Manuals

The Contractor shall provide 5 copies of an operation and maintenance (O & M) manual for the constructed systems. The manuals shall be typewritten or printed and bound in durable 3-ring binders. A draft copy of the manual is due when 50% of the performance time for the contract has elapsed. The Contractor should allow 10 days from receipt by the Project Engineer for review and approval or rejection by the Owner.

The Final Manual shall incorporate the Owner's review comments and be approved by the COR prior to final payment. The Final Manual shall be submitted five days prior to the Final Inspection.

These Operation and Maintenance Manuals shall include the following information as a minimum.

- a. Identification on the front cover stating the general nature of the manual; e.g.:

OPERATION AND MAINTENANCE MANUAL
_____ SYSTEM

A Cooperative Project
_____ Nation
Indian Health Service, PL 86-121

- b. Table of Contents. Table of Contents of all sections, sub-sections and components referenced to page numbers.
- c. Operation and Maintenance Manual Format. The Operation and Maintenance Manual format shall include a narrative description of the overall system and its major sub-systems (in layman's language). The narrative description of the overall system shall be presented in the same order as the primary sections and subsections listed in (d). Troubleshooting shall include common problems for the control system, relays, motor overload, breakers, starter, etc., with physical reference to schematic and physical wiring number system.
 - i. Primary Sections. The manual shall be divided into primary sections, each of which describes a major sub-system. The primary sections shall be listed in the order shown in (d). Each primary section shall include a detailed narrative description (in layman's language) of its function in relationship to the overall system.
 - ii. Sub-Sections. Each primary section shall be divided into sub-sections as listed in (d). Each sub-section shall include a comprehensive and complete equipment and appurtenance listing followed by a comprehensive description of each component listed.
- d. Operation and Maintenance Manual Primary Sections and Sub-Sections:

Change sections depending on type of system; i.e., water or sewer.

 - i. Include material list of all items discussed above, including manufacturer's bulletins and troubleshooting and repair manuals, lists of replacement parts, part numbers, and the name and address of a local vendor where parts may be purchased.
 - ii. Copy of all submittals listed on submittal review form and shop drawings (including 24" x 36" reproducible drawings of control panel and ladder diagrams), with all data concerning all changes made during construction.
 - iii. Copy of all related guarantees and warranties issued.

3. As-Built Drawings

The as-built drawings shall be a record of the construction as installed and completed by the Contractor. They shall include all the information shown on the contract set of drawings and a record of all construction deviations, modifications or changes from those drawings which were incorporated in the work; all additional work not appearing on the contract drawings; and all changes which are made after final inspection of the contract work.

The Contractor shall mark up a set of plans to show the as-built conditions. Those as-built marked prints shall be kept current and available on the job site at all times, and be made available to the COR upon request. The changes from the contract plans which are made in the work or additional information which might be uncovered in the course of construction shall be accurately and neatly recorded as they occur by means of details and notes. No construction work shall be concealed until it has been inspected, approved, and recorded. The drawings shall show at least the following:

- a. The project number, contract number, community name, and other relevant general information.
- b. The location and description of any utilities or other installation known to exist and or encountered within the construction area. The location of these utilities shall include accurate description, dimensions, and at least 2 ties to permanent features for all utilities encountered.
- c. The location and description of all facilities installed by the Contractor. The location of facilities shall include accurate dimensions and at least 2 ties to permanent features for all major components, including gate valves, curb stops, meter boxes, and cleanouts. Perpendicular off-set measurements from the roadway center to the centerline of the pipeline installed shall be recorded on the as-builts at 100 foot intervals while the pipeline is being installed.
- d. As-builts for homesites shall be submitted in a 3-ring binder on an 8.5" x 11" sheet at a scale of 1" = 20' with a north arrow. Two 3" x 5" photographs from opposite ends of the facilities constructed shall be taken while the excavation is open and included with the 8.5" as-builts in a protective plastic cover. Reference of photos and as-builts shall be by the homesite owner name and house number.

A set of the as-builts shall be delivered to the Project Engineer at the time of the request for final inspection for review and approval. As-built drawings must be approved before final payment will be made.

SUBMITTAL REVIEW FORM (Example)

(The Contractor shall furnish material submittals, design submittals, shop drawing, operation and maintenance manuals, and as-built drawings in accordance with the requirements this schedule. Material submittals, shop drawings, design submittals, certification and all other submittals required by the Technical Provisions or drawings shall be listed or added to the Submittal Review form by the Contractor with an appropriate reference to the technical provision or drawing requiring the submittal. Omission of a submittal requirement from the submittal review form by the Owner does not relieve the Contractor from the Technical Provision or drawing requirement.)

Received by Proj. Engr.: _____ Submittal No. _____
Date Initial

Contract Name _____

Contract Number _____

Returned to Contractor: _____ Contractor _____
Date Initial

Project Number _____

MATERIAL SUBMITTALS REQUIRED [change items and specifications for type of system]

Item No.	Item Description and Specification Reference	Contractor Indicate; Type, Model Number, Manufacturer, etc.	Action By Owner, Date
1	Submersible Effluent Pumps TP 21.0		
2	PVC Sewer Pipe		
3	Mercury Float Switches TP 21.0		
4	Concrete Protective Coating TP 21.0		
5	Gate Valves TP 21.0		
6	Check Valves TP 21.0		
7			
8			
9			
10			
11			
12			
13	Effluent Screen TP 29.0		
14			
15	Recirculation Tank Pump TP 28.0		
16			
17	Sand Filter Media TP 28.0		
18	Liner TP 28.0		
19	Infiltration Chamber TP 25.0		
20	PVC Ball Valves TP 25.0		
21	Precast Manhole TP 20.0		

Item No.	Item Description and Specification Reference	Contractor Indicate; Type, Model Number, Manufacturer, etc.	Action By Owner, Date
22	Manhole Frame and Cover TP 20.0		
23	PVC Sewer Pipe TP 20.0		
24	PVC Sewer Service Pipe TP 10.0		
25	PVC Sewer Force Main TP 22.0		
26	Manhole Gaskets TP 20.0		
29			
30			
31			
32			
33	Chain Link Fence TP 4.0		

If the item description for a material submittal is not the exact brand or model specified by the Owner, then 5 copies of the manufacturer's descriptive literature, catalog cut-sheet etc., must be included with the submittal. For design submittals requiring design calculation, shop drawings, and wiring and control diagrams, etc., 5 copies of each must also be included with the Contractor's submittal.

CONTRACTOR: _____
Signature Date

Engineer Approval: _____
Signature Date

Owner Approval: _____
Signature Date

4. DESIGN SUBMITTALS REQUIRED

a. Electrical Power Equipment, Fixtures, and Pump Control Systems - The submittals shall include all of the following items:

- i. Manufacturer's name and model number of all electrical fixtures and components of the control system, and project data sheets for all components.
- ii. Electrical schematic (ladder) diagram of the electrical fixtures and control system showing all circuits and control components in symbolic form using standard symbols. The diagram shall include a legend which explains all symbols, and be on 11" x 17" paper.
- iii. Outline dimension and general physical arrangement drawings of each enclosure, panel board, and conduit sizes and routing locations for all pumps, alarm lights and horns, floats, and electrical fixtures including outlets and switches.

All plans and calculations shall be stamped by a registered Professional Engineer.

(Example) [change items and specifications for type of system]

Item No.	Item Description and Specification Reference	Contractor Indicate; Type, Model Number, Manufacturer, etc.	Action By Owner, Date
1	Power Supply Wire		
2	Main disconnect/Circuit Breaker Switch and enclosure.		
3	Recirculation Tank Electrical Fixtures and Pump Control System		
4	Dosing Tank Electrical Fixtures and Pump Control System		

b. Community Septic Tank, Recirculation Tank, Recirculating Sand Filter Walls: The Contractor shall submit 5 complete sets of detailed structural plans, showing as a minimum: dimensions for tank heights, lengths and widths, wall, floor, and roof thicknesses; footing dimensions; piping; placement and size of reinforcement; invert elevations of inlets and outlets relative to tank floor. Shop drawings for various accessories shall also be submitted with the plans. One set of the plans shall be provided on original reproducible Mylar film. In addition, the Contractor shall submit 5 complete sets of design calculations with the plans. All calculations shall be legible and follow an orderly sequence. The calculations shall clearly state the external loading criteria and assumptions; show the resulting moments and stresses; and detail the resulting cross-sectional area. All plans and calculations shall be stamped by a registered Professional Engineer.

(Example) [change items and specifications for type of system]

Item No.	Item Description and Specification Reference	Contractor Indicate; Type, Model Number, Manufacturer, etc.	Action By Owner, Date
1	Recirculation Tank TP 28.0		
2	Recirculation Sand Filter Walls TP 29.0		
3	Community Septic Tank TP 23.0		

*If the item description for a material submittal is not the exact brand or model specified by the Owner, then 5 copies of the manufacturer's descriptive literature, catalog cut-sheets, etc., must be included with the submittal. For design submittals requiring design calculations, shop drawings, wiring and control diagrams, etc., 5 copies of each must also be included with this submittal.

CONTRACTOR:

Signature Date

Engineer Approval:

Signature Date

Owner Approval:

Signature Date

(Insert Technical Provisions Here)

(Insert or reference accompanying Drawings Here)

